85-1674

No. .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

WILLIAM NADWORNY,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

KENNETH J. FISHMAN,
Counsel of Record,
109 State Street,
Boston, Massachusetts 02109.
(617) 723-1980

JOHN J. JENNINGS,
FRAWLEY & JENNINGS,
56 Central Avenue,
Lynn, Massachusetts 01901.
(617) 595-3333

CHARLES M. BURNIM,
508 Donahue Building,
Beacon Hill,
41 Temple Street,
Boston, Massachusetts 02114.
(617) 723-4700 x614

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

I. The petitioner, who was convicted of murder in the second degree, was denied due process of law by the court's refusal to instruct the jury on the lesser included offense of manslaughter, where the evidence supported such a verdict.

II. The petitioner was denied his due process of law right to a full and accurate review of his conviction of second degree murder, where the reviewing court both failed to recognize facts, and misstated facts critical to the substantive and due process rights of the petitioner to a lesser included instruction on manslaughter, and summarily refused to reconsider its misapprehensions.

III. The court committed prejudicial error in denying the petitioner the opportunity to produce evidence in his own defense explaining a statement attributed to him and admitted as evidence of consciousness of guilt, thus denying the petitioner compulsory process and due process of law.

IV. The court erred in permitting evidence of statements of the petitioner obtained in violation of his privilege against self-incrimination where, when the petitioner was asked by a police officer over the telephone if he knew where Lisa (the deceased) was, responded "she overdosed five months ago," and then immediately said, "I don't want to talk about it," which claim of silence the officer did not heed but thereafter obtained statements from the petitioner tantamount to a confession that he "did not want to go to jail, he couldn't hack it."

V. The court committed prejudicial error in permitting a document authenticated by a handwriting expert to be admitted in evidence where such authentication was violative of the petitioner's privilege against self-incrimination, and where the document provided condemning evidence of motive.

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WILLIAM NADWORNY,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, affirming his conviction of murder in the second degree.

Citation to Opinion Below.

The opinion of the Supreme Judicial Court is reported as *Commonwealth* v. *Nadworny*, 396 Mass. 342, 486 N.E. 2d 675 (1985), and is set forth in the Record Appendix at pp. 1a-

32a.[1] The petitioner timely petitioned the Supreme Judicial Court for rehearing pursuant to Mass. R. App. P. 27, which petition is set forth in the Record Appendix at pp. 33a-40a. On February 10, 1986, his petition was denied without hearing or modification of the court's opinion. The notice of denial is set forth in the Record Appendix p. 41a.

Jurisdiction.

Jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions and Statutes.

UNITED STATES CONSTITUTION.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

[1] Record Appendix is hereinafter abbreviated as "Rec. App."

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14 — Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws.

Chapter 265.

§ 265:1. Murder Defined

Section 1. Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

. . . . . .

§ 265:13. Manslaughter; Punishment.[2]

Section 13. Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years. Whoever commits manslaughter while violating the provisions of sections one hundred and one to one hundred and two B, inclusive, of chapter two hundred and sixty-six shall be imprisoned in the state prison for life or for any term of years.

Statement of the Case.

On June 9, 1983, the defendant was indicted for murder in the first degree of one Lisa Belmonte on a date uncertain, "between March eighteenth and July nineteenth" 1982 (Rec. App. at 42a). By Bill of Particulars (Rec. App. at 43a-44a) the Commonwealth stated as to date and time, location, and manner and means, of the alleged offense:

1. The murder occurred sometime between approximately 6:00 p.m., on March 18, 1982 when the victim, Lisa Belmonte, was last seen alive and approximately 3:00 p.m., on July 19, 1982 when the victim's body was found. The Commonwealth is unable to specify further as to the time of the murder.
2. The Commonwealth is unable to specify as to the exact location where the murder occurred.
3. The defendant did with deliberately premeditated malice aforethought murder Lisa Belmonte in a manner which

[2] There is no statutory definition of manslaughter. The statute invokes the common law crime, merely providing a penalty. "Manslaughter is the unlawful killing of another without malice; . . ." *Commonwealth* v. *Webster*, 59 Mass. (5 Cush.) 295, 304, 326 N.E. 2d 905 (1850).

> cannot be precisely determined due to the advanced state of decomposition of the victim's body when it was discovered concealed in the trunk of a motor vehicle owned by the defendant. The Commonwealth is unable to specify further as to the manner and means of the murder.

The petitioner was tried before a jury commencing on May 24, 1984. A verdict of guilty of murder in the second degree was returned on June 12, 1984.

Petitioner filed a timely appeal to Massachusetts Appeals Court. Upon the application of both the petitioner and the Commonwealth, the Supreme Judicial Court granted direct appellate review pursuant to Mass. R. App. P. 11. On December 11, 1985, the Supreme Judicial Court affirmed the petitioner's conviction of murder in the second degree (Rec. App. at 1a-32a). The petitioner presented a timely Petition for Rehearing (Rec. App. at 33a-40a) to the Supreme Judicial Court pursuant to Mass. R. App. P. 27, which was denied by the court on February 10, 1986 (Rec. App. at 41a).

Statement of the Facts.

On March 18, 1982, Lisa Belmonte, the petitioner's seventeen year old girl friend disappeared (Rec. App. at 4a, 6a). She was last seen by a clinical social worker whom she was consulting because of personal and family complications caused, in part, by her "seeing" an older and married man, the petitioner[3] (Rec.

[3] The petitioner was twenty-six (Tr. V4 p. 69).* Ms. Belmonte's relationship with the petitioner was intolerable to her parents. They forbade her to see him (Tr. V5 pp. 31-36). Ms. Belmonte was very unhappy at home (Tr. V4 pp. 67-68, V11 p. 8). Her mother suspected her of using drugs (Tr. V5 pp. 23-26). She ran away on a number of occasions, for several days at a time (Tr. V4 pp. 73, 75-76). She resented her parents and her sisters (Tr. V5 pp. 38, 44-45, 113), would not talk to them, and most of the time, secluded herself in her room (Tr. V5 pp. 56-57). She was stubborn and disobedient. Her mother sought the intervention of the court by filing a "CHINS" petition (Tr. V4 p. 78). Ms. Belmonte received counselling pursuant the "CHINS"** action at

App. at 6a). She told the social worker that she was now seeing a former boy friend who had returned from the service, and that she was going to see the petitioner that evening to tell him that their relationship was over (Rec. App. at 6a; Tr. V9 pp. 135-138).

On July 19, 1982, Lisa Belmonte's decomposed body was recovered from the trunk of the petitioner's automobile (Rec. App. at 9a-10a). Upon autopsy, there was no evidence of violence or injury. Because of the advanced state of decomposition, no cause of death could be established (Rec. App. at 10a-11a). Although sophisticated testing for the presence of drugs or chemical poisons was performed, none were found (Rec. App. at 11a). There was undisputed evidence that many agents that could have caused death would have been dissipated by the time of the analysis so as to leave no trace (Tr. V8 pp. 103-104, 118-123) (see also *infra* n.10). The Commonwealth's sole medical expert, the autopsy pathologist, testified only as to "possible"[4] causes of death. They included "[s]uffocation, smothering, injection of different drugs, poisons, carbon monoxide poisoning, drowning, and a large number of chemicals." (Rec. App. at 11a.) "[The doctor] acknowledged that the examples of the causes of death he cited as consistent with his autopsy findings were not exhaustive and there were other ways Lisa could have died. He also acknowledged that each of those examples of causes of death could have been self-induced or could have occurred by accident." (Rec. App. at 18a.)

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the Family and Children's Service of Greater Lynn, Massachusetts, from the said clinical social worker (Tr. V4 pp. 78-80).

* "Tr." is abbreviation for Trial Transcript, and "V" is a reference to the transcript Volume.

** Massachusetts General Laws c. 119, §§ 39E-J, entitled, "Children in Need of Services" (CHINS), is a statutory scheme for resort to, or intervention by, the courts in situations of difficulty with children.

[4] He testified that because, ". . . I couldn't find any medical cause of death, these would be several possibilities." (Tr. V8 pp. 107-108.)

The pathologist was unable to say whether any of these possible causes was likely, or more likely than any other.[5]

There was evidence the petitioner was particularly infatuated with Lisa Belmonte, and was aware she had resumed her relationship with her former boy friend. Indeed, in early March, he wrote to her on the subject, voicing his despondence (that he felt "used") and jealousy. He pleaded for her continued companionship (Rec. App. at 5a, 14a-15a). This she was not to give him. "Lisa sent the defendant a letter . . . in which she made clear that if she met with the defendant again it would only be for the purpose of saying goodbye." (Rec. App. at 6a.)

Upon the stage of the indefinite evidence as to cause of death, there was laid by the prosecution two inconsistent statements made by the petitioner as to how Lisa died. The petitioner maintains that these statements, in conjunction, in particular with the "possible" causes of suffocation and drug overdose, required an instruction on the lesser included offense of manslaughter.

First Statement.

After strong suspicion by one Earl Bethune, a friend of the petitioner, that Lisa's body was in the trunk of the petitioner's

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[5] On cross-examination the doctor's testimony concluded as follows:

Q And you can't say the whole list of possibilities that you gave when Mr. McAlary [the prosecutor] asked you whether they did happen or didn't happen, can you?

A I cannot.

. . . . . .

Q No. I am asking you can you say it with reasonable medical certainty that any particular one of those that you named was indeed the cause of death?

A No, I cannot.

(Tr. V8 pp. 160-161.) There was no further examination by the prosecutor of this witness.

automobile, the petitioner told Bethune that Lisa's body was in the trunk, and that he had wanted to tell him before. He said that Lisa was at his apartment one night and that "*someone had injected her with an overdose*" (Rec. App. at 9a; V5 p. 220, V6 pp. 110-112) (emphasis added). He said that he was afraid to call the police, because then Mr. Belmonte (Lisa's father) would know that Lisa was there and would kill him as he had threatened. (Rec. App. at 9a; V6 pp. 73-76, 113-114.)[6]

Second Statement.

Later that evening the petitioner told one Debra Lewis that Lisa was dead, that *"she had overdosed"* (V10 p. 141; see Rec. App. at 9a). He said that *"Lisa had come to his apartment and started to go into convulsions"* (V10 p. 142; see Rec. App. at 9a), that *"she fell on the floor and he tried to save her himself"* (V10 p. 141; see Rec. App. at 10a[7]), *"but she died"* (quotations are from trial transcript, emphasis added). He said he didn't call an ambulance because he was afraid that if they came, and she died, the Belmontes would blame him (Rec. App. at 10a; V10 p. 141).

Upon this evidence the jury was instructed only on murder in the first degree and second degree. Mass. G.L. c. 265, § 1.[8] The petitioner requested an instruction on the lesser included

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[6] Mr. Belmonte had been violent to the defendant on prior occasions in attempts to keep him from seeing his daughter. Mr. Belmonte, six foot four inches tall, weighed 260 pounds (V11 p. 4). The jury was able to observe the defendant. Mr. Belmonte had physically attacked the defendant, had cut the defendant's car off, pulled the defendant from it, and beat him. And, on Thanksgiving of 1981, he kicked in the door of the defendant's apartment in search of his daughter (V6 pp. 114-116, V7 p. 204, V11 pp. 9, 202-213, 219).

[7] The Supreme Judicial Court is in error in its opinion in reciting the word "save" as "stop." See *infra*, Reason II.

[8] The distinction between first and second degree murder, here pertinent, is that first requires proof of a *mens rea* of "deliberately premeditated" malice aforethought, whereas second requires merely "malice aforethought."

offense of manslaughter (Rec. App. at 19a-20a, 45a), which was refused.

It is clear that the petitioner was convicted on the strength of his jealous motive, his possession of the body, and several incriminating statements in the nature of consciousness of guilt — including his statements as to how Lisa died.

The petitioner presents constitutional issues of the denial of due process of law both in the trial court's refusal to instruct on the lesser included offence of manslaughter, where there was evidence to support such a finding, and in the failure of the Supreme Judicial Court to consider, on the petitioner's Petition for Reconsideration, its holding that a manslaughter instruction was not warranted on the facts, where clear misapprehensions by the court of facts critical to the issue of manslaughter were brought to the court's attention in such petition; Fifth Amendment violations in the obtainment of certain of his incriminating statements, including a compelled handwriting exemplar incorporating a testimonial informative of "right-handedness," which was used to authenticate his disconsolate and plaintive letter to Lisa; and a Sixth Amendment denial of compulsory process in precluding testimonial explanation of one such incriminating statement.

Reasons for Granting the Writ.

I. THE PETITIONER, WHO WAS CONVICTED OF MURDER IN THE SECOND DEGREE, WAS DENIED DUE PROCESS OF LAW BY THE COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER, WHERE THE EVIDENCE SUPPORTED SUCH A VERDICT.

In *Beck* v. *Alabama,* 447 U.S. 625, 100 S. Ct. 2382 (1980), interpreted in *Hopper* v. *Evans,* 456 U.S. 605, 102 S. Ct. 2049 (1982), this Court held that a defendant in a capital case

is entitled as a matter of due process of law to an instruction on a lesser included offense where the evidence in the case could reasonably support a finding of guilty of the lesser offense. These cases have come to be regarded as indicative of the requirement of such instructions in noncapital cases as well. See *Look* v. *Amaral*, 725 F.2d 4 (1st Cir. 1984); *Bell* v. *Watkins*, 692 F.2d 999 (5th Cir. 1982), *cert. denied*, 464 U.S. 843, 104 S. Ct. 142 (1983); *Davis* v. *Greer*, 675 F.2d 141, 143-144 (7th Cir.), *cert. denied*, 459 U.S. 975, 103 S. Ct. 310 (1982); *United States* v. *Neiss*, 684 F.2d 570 (8th Cir. 1982); *Dukette* v. *Perrin*, 564 F. Supp. 1530, 1534-1540 (D.C. N.H. 1983); *Simpson* v. *Garrison*, 551 F. Supp. 618 (D.C. W.D.N.C. 1982), *aff'd* 705 F.2d 445 (4th Cir. 1983).

The petitioner requested an instruction on the lesser included offence of manslaughter. The settled law of the Commonwealth is:

> In a homicide case, the trial judge should charge on the issue of manslaughter where any view of the evidence will permit a finding that the offence is manslaughter and not murder.

Commonwealth v. *LePage*, 352 Mass. 403, 419, 226 N.E. 2d 200 (1967). To omit such a required instruction is reversible error. *Commonwealth* v. *Martinez*, 393 Mass. 612, 473 N.E. 2d 167 (1985). In the instant case the Supreme Judicial Court held there was no error in not affording the petitioner a manslaughter instruction because:

> no view of the evidence, resolving all reasonable inferences in favor of the defendant . . . permitted a finding of . . . involuntary . . . manslaughter.

(Rec. App. at 20a.)

With respect this conclusion is plainly wrong. It fails to recognize evidence supportive of several theories of involuntary manslaughter — namely (1) recklessness, (2) unintended death by reason of battery, and (3) failure to act, or the undertaking of rescue.

Theories of Involuntary Manslaughter and the Evidence.

(1) *Reckless Overdose*:

In rationalizing that the petitioner caused Lisa's death, the Supreme Judicial Court said that "[t]he jury was free to disbelieve" the defendant's explanation that Lisa " 'was overdosed' by the hand of another, or 'overdosed' herself." (Rec. App. App. at 15a.) This is, of course, true. But the court failed to recognize that the jury was equally free to believe from the petitioner's statements that Lisa did overdose, and that the petitioner was that "other" — that *he had* administered or provided the drugs.[9] The administration of dangerous drugs is

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[9] There was further support for an overdose theory from the prosecution's case itself. The autopsy pathologist's original findings, to which he testified, revealed multiple pinpoint needle marks appearing on the front of the right thigh (Rec. App. at 11a; V8 pp. 72, 125-126, 137). The Supreme Judicial Court noted:

> [The doctor's] initial examination revealed "some pitted marks . . . more than twenty-five" in the right inguinal area, which he at first thought might have been needle marks. Upon microscopic examination, he revised his opinion and testified that the marks were caused by pressure because of the body's position, or by maggots.

(Rec. App. at 11a.) The jury was free to believe his original findings. In addition, Lisa's former boy friend (with whom she had resumed her relationship) testified that he had a brief telephone conversation with Lisa shortly after her session with the social worker (Rec. App. at 7a; V11 p. 102), and that Lisa said she was going to do something that he wouldn't approve of. He testified

reckless, so that a resulting death may support a verdict of involuntary manslaughter. It has long been the law of the Commonwealth that involuntary manslaughter may be found where the circumstances are not as dire, or the likelihood of death is not so plain and strong, as in murder. *Commonwealth* v. *Pierce*, 138 Mass. 165 (1884). Culpability for conduct is "according to the degree of danger attending it." *Id.* at 178. This is a jury question. The jury could have found that the petitioner recklessly overdosed Lisa. It is clear that the jurors were free to believe that the lack of the presence of drug or chemical traces in Lisa's body was by reason of the processes of decomposition.[10]

(2) *Battery — Unintended Death*:

Despite the indefiniteness of the evidence of cause of death, the Supreme Judicial Court was "satisfied that no juror could reasonably infer" that death was by other than violent means — by affirmative act of the petitioner (Rec. App. at 20a). The court quoted the trial judge's instruction given in the course of the charge on murder: "*unlawful killing,*" "*death by violence,*" "*caused injury to the victim by violence while she was alive,*" and "*intention to inflict injury* without legal justifica-

that he had told Lisa that there were only two things that he would not approve of: "taking drugs and seeing Billy," the petitioner (V11 pp. 120-121).* Accordingly, the jury could have believed that Lisa did take drugs (at the hand of the defendant) which caused her death.

* The Supreme Judicial Court opinion does not recite this portion of the conversation. See *infra*, Reason II.

[10] There was much evidence to support this rationale for the lack of trace findings in the prosecution case. The autopsy pathologist testified that several types of drugs "would not be detectable by reason of decomposition," and that a "wide range of drugs, would be metabolized by the bacteria that live in the body after death." (V8 pp. 118-123.)

The Supreme Judicial Court opinion does not recite these facts. The court's statement that, "All the drugs tested could be expected to have registered trace amounts if present" (Rec. App. at 11a) is not an accurate statement of the evidence. See *infra*, Reason II.

tion." *Id.* at n.9. (Emphasis in original.) Battery is, of course, "violence." It is the settled law of the Commonwealth that battery may be the cause of an unintended death constituting involuntary manslaughter. *Commonwealth* v. *Campbell,* 352 Mass. 387, 398-399, 226 N.E. 2d 211 (1966).[11] On the basis of the evidence the jury could have found that the petitioner committed a battery. Accordingly an instruction on involuntary manslaughter was required. *Id.* Trauma need not be apparent in such a death. At any rate the jury could have found, and perhaps did, that the lack of the presence of trauma at the site of the battery was explained by the effects of decomposition.

Alternatively the death need not have been caused by a traumatic battery. The autopsy pathologist testified that death was "consistent" with "suffocation" or "smothering" (Rec. App. at 18a). Consequently, the jury could have believed that the petitioner, in a state of frustration caused by Lisa's adamant refusal to continue their relationship, intending merely to frighten and intimidate her to stay with him, choked Lisa with his hands, or smothered her with a pillow (or other object freely available to him). See *Commonwealth* v. *Campbell, supra.* An unintended death in the commission of a battery is involuntary manslaughter. It has been simply and authoritatively put by the Supreme Judicial Court: "manslaughter is simply a battery that causes death." *Id.* at 399.

(3) *Failure to Act — Undertaking Rescue*:

On the evidence, the jury could have found that the petitioner, either: (1) having provided Lisa with the drugs (or having injected her) failed to summon help (having a duty to do

[11] In *Commonwealth* v. *Campbell,* 352 Mass. 387, 398-399, 226 N.E. 2d 211 (1966), the court held that a manual choking causing death did not preclude an involuntary manslaughter instruction. There the court said: "We cannot accept the Commonwealth's contention that no instruction on manslaughter was necessary. . .. [W]e cannot agree that Campbell's conduct requires that malice be implied." *Id.* at 398.

so by reason of having so placed her in peril, *Commonwealth* v. *Bianco*, 388 Mass. 358, 371 n.2, 446 N.E. 2d 1041 (1983) (Liacos, J., dissenting)); or (2) discovering her in a perilous condition, undertook for selfish or untoward reasons to *save* her himself rather than summon appropriate aid. Additionally, and independent of whether or not the petitioner was the agent of drugs, the jury could have found that undertaking rescue in these circumstances not only precluded appropriate aid, but was reckless. In this context the Supreme Judicial Court made an error of significant fact (which, with other misapprehensions of fact, is argued separately in Reason II). The court said:

> The defendant telephoned Debby about 10 P.M. The defendant told her that Lisa overdosed, that she had gone into convulsions, that he tried to *stop* her, but that if he had called an ambulance and she died, the Belmontes would blame him. [Emphasis added.]

(Rec. App. at 9a-10a.) The court's misapprehension of fact that the defendant had tried to "*stop*" Lisa (rather than *save* her) is critical, for had the defendant tried to stop Lisa from taking drugs, no reckless undertaking of personal rescue by treatment could have occurred.[12] However, if he had tried to *save* her, reckless undertaking is presented.

The petitioner argued in his Petition for Rehearing that " 'The [constitutional] burden of proof is on the Commonwealth to prove every element of the offense charged.' *Commonwealth* v. *McCauley*, 355 Mass. 554, 559, 246 N.E. 2d 425 (1969). Here the Commonwealth's own evidence fairly raised the issue

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[12] Of further significance in the court's misapprehension, perhaps indicative of the court's failure to recognize the reckless-overdose-manslaughter issue, is the fact that had the petitioner tried to *stop* Lisa from taking the drug, he could not have been the source or administrator of the drug, and thus could not have been culpable of manslaughter on a reckless overdose theory.

of involuntary manslaughter. . . . [Accordingly] the Commonwealth must carry its burden of proof beyond a reasonable doubt as to each element. *Cf. Commonwealth* v. *A Juvenile,* 396 Mass. 108, 113, 483 N.E. 2d 822 (1985) [*citing In Re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068 (1970)]" (Rec. App. at 38a-39a.)

II. The Petitioner Was Denied His Due Process of Law Right to a Full and Accurate Review of his Conviction of Second Degree Murder, Where the Reviewing Court Both Failed to Recognize Facts, and Misstated Facts Critical to the Substantive and Due Process Rights of the Petitioner to a Lesser Included Instruction on Manslaughter, and Summarily Refused to Reconsider its Misapprehensions.

The opinion of the Supreme Judicial Court evidences three misapprehensions of fact which contributed to the error (as demonstrated in Reason I) in the court's finding that the petitioner was not entitled to an instruction on the lesser included offense of manslaughter.

First, although noting that Lisa's former boy friend had a telephone conversation with Lisa the night she disappeared, during which she told him "she would call him later" (Rec. App. at 7a), the court failed to recognize the balance of her statement: that she was going "to do something . . . [he] wouldn't approve of" (V11 p. 120). The jury could have found that she meant "taking drugs and seeing Billy." See *supra,* n.9.

Second, the court said, "All drugs tested could be expected to have registered trace amounts if present." (Rec. App. at 11a.) The evidence was otherwise. See *supra,* n.10.

Third, the court said that the petitioner had tried to "stop" Lisa. See *supra,* n.7.

It was within the jury's prerogative to draw each of these facts.[13]

Each of these errors of fact affected the petitioner's substantive rights under the law of the Commonwealth, as argued in Reason I respecting both reckless overdose and reckless undertaking of rescue. It cannot be said, as the court did, that:

> no view of the evidence, resolving all reasonable inferences in favor of the defendant . . . permitted a finding of . . . involuntary . . . manslaughter.

(Rec. App. at 20a.)

Each of these errors of fact was critical to the petitioner's right to full and accurate appellate review as a matter of due process of law. The petitioner respectfully submits that he has been denied such review, and requests this Court to grant this Petition for the purpose of remanding this matter to the Supreme Judicial Court for the reconsideration that it summarily denied the petitioner in the context of his Petition for Rehearing.

III. The Court Committed Prejudicial Error in Denying the Petitioner the Opportunity to Produce Evidence in his Own Defense Explaining a Statement Attributed to Him and Admitted As Evidence of Consciousness of Guilt, Thus Denying the Petitioner Compulsory Process and Due Process of Law in Presenting a Defense.

Earl Bethune testified that in April 1982, the petitioner told him Lisa had been seen in New Hampshire hijacking trucks

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[13] In *Commonwealth* v. *Campbell*, *supra* at n.11, at 398 the court recognized the principle that:

> "The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . . That is a question within the exclusive province of the jury."

(Rec. App. at 20a-21a; V5 p. 201). The petitioner attempted, in defense, to explain the reason for this statement to Bethune — to show that it was not a falsification in the nature of consciousness of guilt. The petitioner's father testified that in April of 1982 he had had a conversation with policewoman Clara Zamejtis (Rec. App. at 21a) at a veterans' meeting, and that he told his wife and the petitioner what he had learned from Officer Zamejtis. When asked what he told the petitioner, the prosecution objected (V13 pp. 83-84). The petitioner made an offer of proof that the witness would testify: "I told him that Clara Zamejtis had told me that Lisa Belmonte had been seen up in New Hampshire hijacking trucks."[14] The judge asked, "What was the son's response?" and defense counsel replied, "None." The judge sustained the objection. Defense counsel persisted:

> If it pleases the Court, this is a critical piece of evidence. The Government has attempted at the time to say that a statement that this defendant made was an implied admission of consciousness of guilt because he says Lisa has been seen up in New Hampshire hijacking trucks. This indicates the source and undercuts completely whether it was an implied admission and it is critical.

(V13 pp. 84-85.) Apparently, the judge labored under the belief that the statement had to qualify as an "adoptive admission." He did not appreciate that the statement was not being offered as hearsay, but to show the state of mind induced in the defendant so as to account in turn for his statement to Bethune. This evidence was admissible. See, *Commonwealth*

[14] Time of death could not be established (Rec. App. at 10a). As a matter of fact it was entirely possible for Lisa to have run away to New Hampshire for some period of time.

v. *Edmonds*, 365 Mass. 496, 313 N.E. 2d 429 (1974); *Commonwealth* v. *Errington*, 390 Mass. 875, 880, 460 N.E. 2d 598 (1984). The defendant was denied his constitutional rights of compulsory process and fair trial to present evidence in his own defense. *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920 (1967); *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973); *Commonwealth* v. *Bohannon*, 376 Mass. 90, 94, 378 N.E. 2d 987 (1978).

The Supreme Judicial Court noted "some merit" in the argument, but held that because of the "substantial additional evidence of consciousness of guilt" there was no prejudice (Rec. App. at 21a). However, the assumption of such additional evidence does not lessen the error, or render it harmless. The petitioner was convicted in large measure because of such evidence, and the incriminating connotation that the prosecution placed on them. If the petitioner could have rebutted a guilty mind in the making of the instant statement, the jury may have had a different mind as to the truth and therefore the connotation of his other statements. Declarations of consciousness of guilt are at best "equivocal." See (Rec. App. at 30a), *Commonwealth* v. *Toney*, 385 Mass. 575, 585, 433 N.E. 2d 425 (1982).[15] Here, the integrity of the fact finding process is so at risk, that the error was prejudicial.

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[15] In *Commonwealth* v. *Toney*, 385 Mass. 575, 585, 433 N.E. 2d 425 (1982), the court issued caution, and directed instructions concerning the use of evidence of consciousness of guilt: "We think that a judge should instruct the jury (1) that they are not to convict a defendant on the basis of evidence of flight or concealment [consciousness of guilt] alone . . . ."

The petitioner claimed error in the failure of the trial judge to follow this directive. The Supreme Judicial Court found no error, but noted that "the instruction given in the case at bar was not a model of clarity regarding the fact that a defendant may not be convicted on consciousness of guilt evidence alone, . . ." (Rec. App. at 30a). Most of the case against the petitioner was in the nature of acts or declarations of consciousness of guilt, including the possession of Lisa's body. The petitioner had urged to the court below:

> This is a case which presses a very substantial risk of a miscarriage of justice, evoking, the highly emotional and irrational reaction:

IV. THE COURT ERRED IN PERMITTING EVIDENCE OF STATEMENTS OF THE PETITIONER OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION WHERE, WHEN THE PETITIONER WAS ASKED BY A POLICE OFFICER OVER THE TELEPHONE IF HE KNEW WHERE LISA (THE DECEASED) WAS, RESPONDED "SHE OVERDOSED FIVE MONTHS AGO," AND THEN IMMEDIATELY SAID, "I DON'T WANT TO TALK ABOUT IT," WHICH CLAIM OF SILENCE THE OFFICER DID NOT HEED BUT THEREAFTER OBTAINED STATEMENTS FROM THE PETITIONER TANTAMOUNT TO A CONFESSION THAT HE "DID NOT WANT TO GO TO JAIL, HE COULDN'T HACK IT."

The petitioner moved to suppress statements which were violative of his privilege to remain silent. The motion was denied (Rec. App. at 26a-27a, 46a-49a). A police officer, who was at the petitioner's parent's home in pursuance of the investigation, spoke with the petitioner on the telephone. Prior to the conversation the officer had information that Ms. Belmonte had overdosed, was dead, that her body was in the trunk of the defendant's car, and that the defendant had left the Bethune premises in the car (Rec. App. at 46a-47a; V7 pp. 16-18).

The officer's purpose in speaking with the petitioner was to learn more (V7 pp. 16-18). He asked the petitioner if he knew where Lisa was. The petitioner responded, "She over-

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> "If the defendant had Ms. Belmonte's body, he must have killed her."
>
> It is a case, in the nature of things, which depends for its justice upon the integrity of an appellate court, free from the heat of battle of the trial arena, to dispassionately and rationally examine whether "[t]he material evidence discloses . . . [any and sufficient] basis for the conclusion that the deceased met death by the act of the defendant." *Commonwealth* v. *Curtis*, 318 Mass. 584, 587 [63 N.E. 2d 341] (1945).

The preclusion of evidence to the petitioner, which had the potential of broadly impacting on the prosecution's proof, was a most egregious violation of the petitioner's right to a fair trial.

dosed five months ago," and then immediately said, "*I don't want to talk about it.*" (Rec. App. at 47a; V7 p. 18) (emphasis added). This was a clear claim by the defendant of his privilege against self-incrimination. Despite this assertion of the privilege, the officer persisted by asking about Ms. Belmonte's whereabouts, and where the petitioner's car was located. The petitioner remained silent.[16] Then the officer coaxed, cajoled, and intentionally took advantage of the defendant's feelings of isolation, and confusion, by telling him that his family was "in back of him and loved him," and asked him if he would come home or meet the officer somewhere (Rec. App. at 47a; V7 p. 18). The officer testified that he wanted to get the defendant to talk (V7 p. 18). The defendant replied to this that he "did not want to go to jail," that he "couldn't hack it," and that he needed time to think and might contact the officer later (V6 p. 219; Rec. App. at 48a). These statements of the defendant were admitted against him (V6 p. 219).

The defendant's desire to remain silent should have been respected. The privilege may be asserted irrespective of custody. See, *Commonwealth* v. *Burke*, 339 Mass. 521, 531-533, 159 N.E. 2d 856 (1959). "The statements made to [the defendant over a telephone] by the police officer were, . . . designed to undermine [the defendant's earlier] decision to remain silent . . . ." *Commonwealth* v. *Jackson*, 377 Mass. 319, 326, 386 N.E. 2d 15 (1979). "The fact that the police used any form of interrogation after the assertion of the right to remain silent would itself have required suppression of the resulting statement." *Commonwealth* v. *Forde*, 392 Mass. 453, 455, 466 N.E. 2d 510 (1984). See also, *Commonwealth* v. *Gallant*, 381 Mass. 465, 468, 410 N.E. 2d 704 (1980) (insufficient

[16] The officer did not testify to the fact of inquiring about the defendant's automobile, and the defendant's resulting silence, at the trial, but had so testified at the hearing on the motion to suppress, and the motion judge so found (Rec. App. at 47a).

passage of time between the assertion of the privilege and police pursuance of interrogation). In the instant matter the Supreme Judicial Court found no error stating that "Miranda warnings are necessary only for custodial interrogations." (Rec. App. at 27a.) With respect the court misses the issue. Custody merely triggers the requirement to warn pursuant to *Miranda*. It is elementary that the availability of the Fifth Amendment protection against self-incrimination is not limited to "custody" contexts. The court's reliance upon *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), to find no violation of the right to remain silent, was error. And it was error of substantial dimension. The petitioner's statements that he "didn't want to go to jail", that he "couldn't hack it", amount to confessions, understandable as "I did it, but I don't want to go to jail."

V. The Court Committed Prejudicial Error in Permitting a Document Authenticated by a Handwriting Expert to Be Admitted in Evidence Where Such Authentication Was Violative of the Petitioner's Privilege Against Self-Incrimination, and Where the Document Provided Condemning Evidence of Motive.

Exhibit #5, a letter purporting to be written by the petitioner to Lisa Belmonte, was admitted over objection (Rec. App. at 5a; V7 pp. 46-48, 76). It figured largely (Rec. App. at 5a) in the court's rationale of the evidence against the petitioner, especially as to his motive, in particular his jealousy, and his feelings of being "used."[17] The letter was authenticated by a

[16] The court wrote:

> [T]he jury could infer that Lisa went to see the defendant on March 18, 1982, to end their relationship. The jury could have believed that the defendant knew Lisa was seeing Curt [her former boy friend] regularly, that she did not wish to see the defendant, and

handwriting expert, a state police trooper, who testified on the basis of an exemplar furnished over objection by the petitioner upon the pre-trial motion of the Commonwealth (Rec. App. at 50a-56a). The basis of the objection is that the exemplar, in the fashion it was obtained, contained significant testimonial characteristics and accordingly was violative of the defendant's privilege against self-incrimination. Two exemplars, Exhibit #8 and #9, each contained the typed statement: "The above are samples of my handwriting with my right/left hand. I normally write with my right/left hand." (Rec. App. at 21a-22a.) The petitioner was obliged to copy the statement selecting "left" or "right," thus declaring his natural hand. He stated "right."

The expert testified that this information on the exemplar was the only way to know which hand had been used (V7 pp. 128-130), that it was helpful in determining whether the subject is feigning, and that he employed the information in making his judgment as to whether Exhibit #5 had been written by the petitioner (V7 pp. 134-135).[18] The petitioner's motion to strike on the basis of this violation was denied (V7 p. 135).

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that she felt the relationship was over. They could also infer that the defendant was still in love with her and wanted to see her very badly but that he also felt "used." This evidence permitted the jury to conclude that the defendant, being jealous, feeling "used," and unhappy and understanding that Lisa wanted to terminate their relationship, had a motive to kill her.

(Rec. App. at 5a-6a, 15a-16a.)

[18] In conclusion defense counsel asked the expert:

Q So you used that determination where a person told you he used his right hand in making your judgment in deciding that the handwriting on the letter and on the note and on the envelope were made by the same person who wrote the two exemplars?

A Yes.

(V7 p. 134.)

Clearly, the informative statements required of the defendant on the exemplar were "testimonial message[s] in addition to a physical display" and were violative of protections against self-incrimination. See *United States* v. *Campbell,* 732 F.2d 1017, 1021 (1st Cir. 1984).

The Supreme Judicial Court held that there was no violation because the petitioner's statement of righthandedness was "'trivial' and does 'not incriminate.'" (Rec. App. at 23a.) Again the petitioner is obliged to observe that this is error, and a very narrow reading of the reach of the right against self-incrimination. The communication was important in the process of authentication of the source of evidence of motive that figured so significantly in the case against the petitioner. How can it be regarded as "trivial", or non-incriminating? How could the court say that "[t]he defendant's righthandedness has absolutely no direct bearing on his guilt or innocence in this case." (Rec. App. at 23a-24a.)

The court further demeans the importance of the communication by stating that, "The Commonwealth, however, was possessed of that knowledge as well [righthandedness], since a State trooper witnessed the defendant's execution of the handwriting exemplar and testified at trial." (Rec. App. at 21a, n.12.) The trooper was *the* expert witness who performed the authentication at trial and who testified to the significance of "knowing" from the petitioner his natural hand. The suggestion that because the expert observed the making of the exemplar he could have made the authentication, begs not only the issue, but the facts. The fact is that the trooper's observation was not the basis of his opinion. Had his opinion been based on observation, the trooper's credibility on "righthandedness" would have been in issue. As a result of the Fifth Amendment violation the issue was conclusively determined. The testimonial message by the petitioner thus aided the prosecution. Clearly there was prejudice, and it was not harmless in view of the condemning manner in which the letter was employed.

Conclusion.

For the several reasons set forth above, the petitioner respectfully prays that a Writ of Certiorari issue from this Court to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

KENNETH J. FISHMAN,
Counsel of Record,
109 State Street,
Boston, Massachusetts 02109.
(617) 723-1980

JOHN J. JENNINGS,
FRAWLEY & JENNINGS,
56 Central Avenue,
Lynn, Massachusetts 01901.
(617) 595-3333

CHARLES M. BURNIM,
508 Donahue Building,
Beacon Hill,
41 Temple Street,
Boston, Massachusetts 02114.
(617) 723-4700 x614

Appendix.

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COMMONWEALTH *vs.* WILLIAM NADWORNY.

Essex. September 11, 1985. — December 11, 1985.

Present: HENNESSEY, C.J., LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Homicide. Evidence, Consciousness of guilt, State of mind, Expert opinion, Handwriting exemplar, Scientific test, Photograph. *Practice, Criminal*, Instructions to jury, Voluntariness of inculpatory statements, Dismissal. *Constitutional Law*, Self-incrimination, Admissions and confessions.

Although the cause of a young woman's death was not ascertainable by an examination of her body, the jury at a murder trial could properly find beyond a reasonable doubt that her death had occurred by homicide, where the evidence allowed the inferences that she was not depressed or inclined toward self-destruction on the day she was last seen alive, that she had been in good health and did not die of natural causes, and that no accident had occurred, and where there was ample testimony placing the victim at the defendant's apartment around seven o'clock on a certain evening, as well as testimony that the defendant had acknowledged that her death had occurred on the evening in question. [ ]

The evidence at a murder trial was sufficient to permit the jury to find criminal agency on the part of the defendant, where they could conclude that he had a motive to kill the victim because he was disturbed and jealous over the ending of his romantic relationship with the victim and where they could also infer from the evidence that the victim had met her death in the defendant's apartment and in his sole presence and that she died in such a manner that the defendant was prompted to seek an unlawful alibi, secrete the body, and conceal the cause of death. [ ]

At a murder trial, there was sufficient evidence, including the circumstances of the defendant's concealment of the victim's body during a period of four months and the defendant's statement to a friend that he hoped an autopsy would not reveal anything, to permit the jury to find that the defendant had acted with the requisite malice. [ ]

Although, owing to the advanced state of decomposition of a young woman's body, a pathologist could not determine the time or cause of her death with reasonable medical certainty or eliminate death by natural causes, it was permissible for him to testify, at the trial of one accused of murdering her, that her death "could have" been caused by, or was "consistent with" various possible occurrences. [ ]

There was no merit to a criminal defendant's contention that the judge at his trial for murder had, in effect, instructed the jury that the defendant's failure to obtain medical help for the victim could constitute murder in the second degree and that, therefore, the judge was required to instruct them on manslaughter. [ ]

Although certain testimony proffered by a criminal defendant might properly have been admitted as tending to rebut an inference that one of his remarks revealed consciousness of guilt, its exclusion did not prejudice the defendant in view of the substantial additional evidence that the defendant had demonstrated consciousness of guilt. [ ]

No infringement of a criminal defendant's privilege against self-incrimination resulted from a court order that he furnish an exemplar of his handwriting, following which the exemplar, containing the sentence, "I normally write with my right hand," was produced by him in the presence of a State police officer, where the exemplar was, in itself, physical, and not testimonial, evidence, and where the testimonial aspects of the defendant's declaration of righthandedness were, in the circumstances of the case, trivial and nonincriminating. [ ]

At a murder trial, testimony by a State chemist that chemical tests had detected the presence of blood on the floor of certain storage bins in the defendant's apartment building and in the trunk of his automobile, but that the age of the stains and whether they were of human origin could not be determined, was merely cumulative, and its admission was not prejudicial to the defendant, where it was uncontested that the victim's body had been stored for some time in the trunk of the automobile, where there was other testimony tending to prove that the body had also been concealed for a time in one of the bins, and where there was testimony that, when discovered, the body was covered with bloodlike secretions. [ ]

At a murder trial, the judge acted within his discretion in admitting in evidence photographs depicting the victim's body in an advanced stage of decomposition, where the state in which the body was found was evidence of malice and consciousness of guilt, and where the photographs assisted the jury in understanding a pathologist's testimony. [ ]

At a murder trial, the judge did not abuse his discretion by admitting in evidence a photograph of the victim taken while she was alive, where the photograph was relevant on the question of identification and as tending to show that death due to ill health or suicide was unlikely. [ ]

There was no error in the denial of a criminal defendant's pretrial motion to suppress, on due process and self-incrimination grounds, certain statements made by him during a telephone conversation with a police officer, inasmuch as the defendant was not in custody when the conversation occurred; nor, in the circumstances, did the defendant's interjection of the words, "I don't want to talk about it," at one point in the conversation render involuntary all of his statements that followed. [ ]

At a murder trial during which evidence was received as to the defendant's statements to police during a noncustodial conversation, the judge acted within his discretion in excluding proffered testimony to the effect that the police had not preceded the conversation with Miranda warnings, where other testimony was adequate to preserve the issue of the voluntariness of the defendant's statements for the jury's determination. [ ]

At a criminal trial, there was no error in the judge's instructions to the jury on the issue of the voluntariness of the defendant's incriminating statements. [ ]

At a criminal trial, the judge adequately instructed the jury concerning the proper consideration of evidence of consciousness of guilt. [ ]

A criminal defendant's motion to dismiss the indictment against him was correctly denied, where he made no showing that the integrity of the grand jury was impaired or that other extraordinary circumstances existed that might render the indictment vulnerable. [ ]

INDICTMENT found and returned in the Superior Court Department on June 9, 1983.

A pretrial motion to suppress evidence was heard by *Andrew R. Linscott*, J., and the case was tried before *Robert A. Barton*, J.

The Supreme Judicial Court granted requests for direct appellate review.

John J. Jennings (*Charles M. Burnim* with him) for the defendant.

Dyanne Klein Polatin, Assistant District Attorney (*Frederick B. McAlary*, Assistant District Attorney, with her) for the Commonwealth.

LYNCH, J. On June 12, 1984, a jury convicted William Nadworny of murder in the second degree. He was sentenced to a term of life imprisonment at the Massachusetts Correctional Institution at Cedar Junction. The defendant filed a timely notice of appeal and later sought a stay of execution of sentence in the Appeals Court, which was allowed. Both parties filed applications for direct appellate review with this court. We granted both applications, and we affirm the conviction.

The defendant challenges his conviction on numerous grounds. He contends that the trial judge erred in not allowing his motions for required findings of not guilty. He also argues that the judge erred in failing to instruct the jury as to voluntary

and involuntary manslaughter. Next, he chailenges the judge's jury charge regarding consciousness of guilt and alleges error in the judge's failure to establish a procedure for the admission and use of evidence of consciousness of guilt. In addition, he maintains that the judge committed several errors in the admission and exclusion of evidence. He further argues that it was an error to admit certain of the defendant's statements; to preclude him from establishing that he had not received Miranda warnings; and to fail to instruct the jury adequately on factors relative to the voluntariness of statements made by the defendant to the police. Finally, the defendant claims that the combined effect of several of the alleged evidentiary errors raises a substantial risk of a miscarriage of justice.

We state the evidence in some detail, because the case against the defendant was largely circumstantial. Lisa Belmonte was a seventeen-year-old student at Lynn Classical High School and lived with her family at 14 Breed Square in Lynn. The defendant was twenty-six years old, and until November, 1981, had lived next door to the Belmontes with his wife.

During the summer of 1981, Lisa and the defendant became romantically involved. Throughout the fall of 1981, the defendant would visit Lisa during her school lunch period almost every day and often picked her up at school. In November, 1981, the defendant separated from his wife and moved to a nearby apartment at 20 South Street, Lynn.

In the fall of 1981, as Lisa began to see more and more of the defendant, her behavior at home began to change. On the weekend prior to Thanksgiving, 1981, Lisa ran away from home and stayed at the defendant's apartment. She was found hiding in one of the basement storage bins in the defendant's apartment building.

As a result of this and other episodes of running away, Lisa's mother and father filed a petition under G. L. c. 119, §§ 39E-39J (1984 ed.) (CHINS), at Lynn District Court, and Lisa was referred to the Family and Children Services of Greater Lynn for counselling.

During this period, Lisa's schoolwork appeared relatively unaffected. Lisa was an "A student," her work was excellent,

and she was very attentive and sociable in school. She missed several weeks of school during the fall of 1981, yet she promptly made up the work. Her teachers saw no indication that during the school year of 1981, Lisa was a drug or alcohol user.

Lisa was in good health. She had never been hospitalized overnight. In September of 1981, she had a lump removed from her breast. Prior to this, a case of swollen glands when Lisa was in junior high school was her most serious episode of illness. The doctor who discovered the lump testified that he gave Lisa a complete physical on September 24, 1981, and that Lisa was in good health, except for the lump. A test for diabetes was also performed at this time and proved negative.

In January, 1982, Curt Willis, a former boyfriend of Lisa's who was then stationed in England with the United States Air Force, informed Lisa that he was to be discharged in March. At the beginning of 1982, Lisa's behavior improved and her mother testified that she was "back to her old self." In early March, Lisa picked Curt up at Logan International Airport and the two began seeing each other almost every day from then until Lisa's disappearance on March 18, 1982.

In January and February, 1982, there was a diminution of contact between Lisa and the defendant. Lisa's classmate and close friend, Debra Ann Lewis, testified that the defendant and Lisa were less frequently seen together during this period, and that, when the defendant would drive by and offer Lisa a ride, Lisa would turn the defendant down. At the end of February, the defendant told Debby that he loved Lisa and "couldn't bear it if they broke up," and asked Debby to tell Lisa that he wanted to see her. The defendant repeated these feelings to Debby Lewis during the course of more conversations throughout early March of 1982.

Presumably in response to a perceived lessening of Lisa's interest in their relationship, the defendant sent her a letter in early March. In it, he acknowledged the change in their relationship and the pain it caused him, the fact that Lisa was seeing Curt Willis "almost every night," and that the defendant felt "used" by her. He asked Lisa to telephone him so that they could get together.

Lisa sent the defendant a letter[1] which was received by him sometime during the beginning of March, in which she made clear that she intended to end their relationship and that if she met with the defendant again it would only be for the purpose of saying goodbye.

On March 18, 1982, Lisa attended a previously scheduled 5 P.M. appointment with Patricia Thompson, a clinical social worker and the counsellor Lisa had been seeing at the Family and Children Services of Greater Lynn. Patricia Thompson testified that Lisa "seemed in excellent spirits. She seemed to be functioning well in all areas of her life." Lisa seemed alert, and her morale was "excellent." Lisa told her that she was planning to break off the relationship with the defendant, had sent a letter to the defendant telling him of her intentions, and that the defendant had written back asking for one more meeting with her. Patricia Thompson and Lisa agreed that Lisa was improved enough to discontinue regularly scheduled counselling sessions. Lisa discussed the fact that she was again dating Curt Willis. Lisa stated that she intended to go over to the defendant's apartment immediately after the counselling session and break off the relationship. Lisa and Patricia Thompson "kind of rehearsed" what Lisa might say to the defendant. Patricia Thompson testified that Lisa was going to say "goodbye" and tell the defendant that she was going to continue to see Curt. Lisa left Patricia Thompson's office just before 6 P.M., seeming calm, cheerful, and perfectly normal.

[1] At trial, two copies of this letter were admitted in evidence. Two days after Lisa disappeared, the defendant allegedly told Lisa's mother that he "had a letter from Lisa and it was all torn up and in his barrel . . . but he would tape it together and send it to" her. Lisa's mother identified the copy introduced by the Commonwealth as an exact copy of the letter she received from the defendant two weeks after this conversation. The copy the Commonwealth had provided to defense counsel in compliance with pretrial discovery was identical in substance, but was pieced together differently from the copy offered at trial by the Commonwealth. Both copies were read to the jury over defense counsel's objections, but a challenge to the introduction of both letters was not raised on appeal and is therefore treated as waived. We observe, however, that the judge gave an appropriate clarifying instruction.

Curt Willis received a telephone call from Lisa at approximately 6 P.M. on March 18. She told him that she would call him later. Curt and Lisa had plans to go to a birthday party together on Friday, March 19. About 7 P.M., this same evening, Lisa telephoned Debby Lewis. Lisa told Debby that "she [Lisa] and Billy [the defendant] was talking [*sic*]." Debby noticed nothing unusual in Lisa's tone.

Earl Bethune, who worked with the defendant and was also a close friend, telephoned the defendant's apartment at 7 P.M. on March 18, 1982, to see if he could spend the night there. The defendant told him not to come. "Lisa's here," he said, "[w]hy don't you come over in a couple of hours She's going to be leaving shortly." Earl Bethune could hear a girl's voice over the telephone during this conversation. At about nine o'clock that night, Earl went to the defendant's apartment. He saw the defendant's car parked outside the apartment house and saw a light on in the defendant's apartment. Earl pushed the defendant's door buzzer persistently, but he received no answer. Lisa did not return home that night. She was never again seen alive by family or friends.

At about noon on March 19, 1982, Debby called the defendant and asked him where Lisa was. He replied that she was probably at school, and that she had left his apartment at 9:30 the night before.

At approximately 6 P.M., March 19, 1982, Earl Bethune went with the defendant to the defendant's apartment. Earl noticed a large red-brown stain on the defendant's white living room rug, which had not been there earlier in the week. The defendant said that someone had thrown up on the rug.[2] The defendant's door buzzer sounded and Lisa's sister, Stephanie, and Curt Willis could be seen on the defendant's television security monitor. The defendant said that if anyone asked where the defendant was the night before, Earl should say he was with the defendant. The defendant then let Stephanie and Curt in and told them that he did not know where Lisa was, and

[2] Several days later, the defendant told Earl that the stain was caused by someone spilling beer on the carpet.

had not seen her in weeks. After Stephanie and Curt left, the defendant told Earl that he had broken up with Lisa the night before and "she got bummed out and left."

The following morning, March 20, 1982, the defendant asked Earl to "alibi" for him if anyone asked where he was on the evening of March 18, 1982. At about 4 P.M. on the same day, Lisa's mother came to the defendant's apartment with Stephanie. Seeing the visitors on his television monitor, the defendant told Earl not to let them in because they wanted to "know where Lisa was" and he "didn't know" and "didn't want nothing to do with them." Earl nevertheless opened the door and the defendant told Lisa's mother he had no idea where Lisa was. The defendant then told Lisa's mother that Lisa had telephoned him the night before and told him that a friend of hers had given her some money and that she was at the Carriage House Motel on Route 1. The Belmontes drove out to the Carriage House immediately, but found no sign of Lisa.

After Lisa disappeared on March 18, 1982, Debby Lewis kept in contact with the defendant daily, trying to "figure out where [Lisa] could be." The defendant accused Debby of knowing where Lisa was. After Lisa had been missing a few weeks, the defendant told Earl Bethune that Lisa had been seen in New Hampshire "hijacking trucks."

In the beginning of April, 1982, Carol Fumicello, the manager of 20 South Street, noticed a terrible odor coming from the basement storage area. She traced the smell to bin number 7 which was locked. Bin number 8 was open and when she looked inside, she saw a dark, sticky, liquid substance on the floor, seeping out from under the wall separating bin number 8 from bin number 7. She asked Dana Bates, the building's maintenance man, to come down to the basement with her. He stated that the strong odor smelled like a dead body. Bates was coincidentally a Saugus police officer and had encountered dead bodies in the course of his police work. The owner of bin number 7 told Fumicello that he had lent the bin to the defendant. The defendant told Fumicello that he was storing a chemical adhesive for vinyl car roofs and would clean the bin that day. The next day Bates found the odor much improved

and saw that an absorbent material was on the floor of bin number 8.

Also in the beginning of April, 1982, the defendant asked Earl Bethune if he could store a 1971 Ford Maverick automobile in Earl's yard because the defendant's father's funeral business needed extra parking space.

On July 19, 1982, Earl Bethune was working on the roof of his garage with Tom Odgers, his tenant, and a carpenter. They smelled a strong odor coming from the vicinity of the car. When they examined the car, they found flies all around the cracks in the trunk and a more powerful odor. Tom Odgers said it "smells like a dead body." When Earl telephoned the defendant to obtain the trunk keys he was told that the smell was only garbage. Earl asked Tom to pry the trunk open. When Tom had opened the trunk lid four to six inches, the defendant drove up, ran to the car, slammed down the trunk lid and asked Tom what he was doing. The defendant then entered Earl's kitchen and asked him "not to say anything to anybody," "Lisa was in there [in the trunk]." He said Lisa was at his apartment one night and someone had injected her with an overdose. The defendant said he had been waiting to tell Earl for a long time, and that he did not know what to do. He had been afraid to telephone the police because he was afraid of Lisa's father. The defendant told Earl that he (the defendant) "wasn't supposed to be with [Lisa]," and that her father had said that if he found out the defendant had been with Lisa, he would kill the defendant. The defendant drove away in the Maverick.

Around 6 P.M., Earl and his wife Vanessa called the defendant's father, Richard Nadworny, and told him what had happened. The defendant's father telephoned the Lynn police, who proceeded to attempt to locate the defendant and his Maverick. During the course of a telephone conversation that evening, Vanessa Bethune said to the defendant, "If you didn't kill her [Lisa] and she died of an overdose, why don't you turn yourself in? You have nothing to hide." He answered, "I can't do that. I don't know what I am going to do." The defendant telephoned Debby about 10 P.M. The defendant told her that Lisa overdosed, that she had gone into convulsions,

that he tried to stop her, but that if he had called an ambulance and she died, the Belmontes would blame him. He told Debby that Lisa was dead and added that "he wasn't in his right mind," and that no one would ever find him.

About 10:15 P.M., the defendant called his parents' home. After talking with the defendant, the defendant's mother handed the receiver to Officer Swiniarski of the Lynn police. The officer identified himself and asked the defendant about Lisa. The defendant replied, "She overdosed five months ago. I don't want to talk about it."

Shortly after midnight, July 20, 1982, two Lynn police officers, Sergeant Jackson and Chief Courtney, answered a call from the defendant's father, and went to the Nadworny family home. The defendant was with his family in the living room. Sergeant Jackson asked the defendant what he wanted to talk to him about. The defendant answered that "[s]he was very sick." Chief Courtney asked, "When was the last time you saw Lisa Belmonte?", and the defendant responded, "Haven't you heard? She overdosed and was in the trunk of the car." At this point, the defendant was given Miranda warnings and placed under arrest.

The defendant's Maverick was located in a car lot in Saugus. It was towed to Lynn Hospital, where a large canvas bag was removed from the trunk. After the canvas bag was cut open, several layers of plastic bags were also cut to reveal the maggot covered body of Lisa Belmonte.[3] Twenty-five feet of electrical cord bound the body into fetal position and wrapped the hands and feet together. The body was covered in bloodlike secretions.

Doctor Khalid Butt, an assistant pathologist at Lynn Hospital performed an autopsy on the body on July 20, 1982. He could determine no cause or time of death due to the body's advanced state of decomposition. However, he found no evidence of significant hematomas or gross injuries on the neck or throat, in the pleural cavity or the abdominal cavity, the back or the chest or on her lower legs. He found no major trauma to the head. Similarly, there were no large scars, injuries, or bullet

[3] The identity of the body is not contested.

marks on the lower legs and arms and no gross injury to the torso. The internal examination of the chest and abdominal cavity, and of the organs contained therein, revealed no suggestion of disease. Dr. Butt testified that in his opinion "it is extremely unlikely [Lisa] died of natural causes,"[4] and unlikely she had any heart disease.

Dr. Butt's initial examination revealed "some pitted marks . . . more than twenty five" in the right inguinal area, which he at first thought might have been needle marks. Upon microscopic examination, he revised his opinion and testified that the marks were caused by pressure because of the body's position, or by maggots. Dr. Butt testified on cross-examination that this area is "not the common area where people use to hide [drug injections] from other people." No track marks typical of drug abuse injection were found on the arms or legs, and no pills were detected in the stomach. An analysis of the liver on July 20, 1982, by a toxicologist for the State Department of Public Safety revealed no drugs. In December, 1982, a Federal Bureau of Investigation examiner from the Chemistry/Toxicology Unit in Washington, D.C., analysed a liver specimen using very sensitive equipment[5] and no evidence of the four drug groups tested for was found. All of the drugs tested for could be expected to have registered trace amounts if present.

Dr. Butt testified that the condition of the body was consistent with death four months prior to autopsy. Indications of cause of death were consistent with "[s]uffocation, smothering, injection of different drugs, poisons, carbon monoxide poisoning, drowning, and a large number of chemicals."

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[4] Dr. Butt's opinion on this issue was based on his findings during the autopsy, as well as these facts he was asked to assume by the assistant district attorney: That Lisa was a seventeen year old who had never been hospitalized except as an outpatient for swollen glands in 1979 and for removal of a lump in her left breast in September, 1981, and that on September 21, 1981, she had a complete physical examination and was found to be a normally healthy sixteen year old at that time.

[5] The toxicologist testified that one technique employed, gas chromotography - mass spectrometry, measured quantities of drugs in nanograms. He defined a nanogram as "about one-thirty billionth of one ounce."

In mid-August, 1982, the defendant told Earl Bethune that on the evening of March 18, 1982, the defendant came home from work and found Lisa dead on the floor of his apartment and that he did not telephone the police because he was afraid Lisa's father would kill him. When Earl asked the defendant what the autopsy revealed, the defendant replied, "Nothing. Hopefully they won't find anything." The defendant also mentioned that since he had helped his father, who was a funeral director, there really "wasn't that much" to carrying a dead body.

From the beginning of 1983, through the summer of that year the defendant spent time at Rockerfeller's Bar in Lynn and became friendly with a customer, Thomas Pagano, and later with a bartender, Patricia Flynn. In July, 1983, the defendant discussed Lisa's death and the Commonwealth's case against him with Pagano. The defendant said that on March 18, 1982, he had come home from a ski trip and found Lisa dead on his floor. He had picked her up, put her in a canvas bag, wrapped it with some cords, and carried it to the dumpster in the basement of his building. He explained the fact that blood was found on Lisa's body by saying that "it is possible [for blood] to come out of a body just because it is dead." He mentioned that the main evidence the Commonwealth was using against him was "blood stains from Lisa's body" found on the floor of his apartment and in the basement. He also added that Lisa did not take drugs. Patricia Flynn testified that in July, 1983, the defendant told her that he found Lisa dead when he came home from skiing. He said the body was all black and surrounded by vomit. He said he called "Hell's Angels types" to dispose of the body, he supplied ropes and bags, and they took care of it. He stated that Lisa did not take drugs, but that he felt she "shot up insulin" and that there was a family history of diabetes and insulin. During a later conversation, he explained the vomit by saying that "a body throws up after it dies."

1. *Denial of motions for a required finding of not guilty.* In reviewing the denial of motions for a required finding of not guilty in a criminal case we "consider whether 'the evidence

is insufficient as a matter of law to sustain a conviction on the charge.'" *Commonwealth* v. *Salemme*, 395 Mass. 594, 595 (1985), quoting Mass. R. Crim. P. 25 (a), 378 Mass. 896 (1979). The motion should be denied if "all the circumstances including inferences [that are not too remote according to the usual course of events] are of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt." *Commonwealth* v. *Shuman*, 391 Mass. 345, 350 (1984), quoting *Commonwealth* v. *Latimore*, 378 Mass. 671, 676 (1979). We view the evidence in the light most favorable to the Commonwealth. *Commonwealth* v. *Fuller*, 394 Mass. 251, 254 (1985). *Commonwealth* v. *Latimore*, *supra* at 676-677. The defendant contends the evidence against him is insufficient to prove cause of death, criminal agency, and malice aforethought.

a. *Cause of death*. The fact that the cause of death was not ascertainable from the body does not of itself preclude the Commonwealth from proving that the victim's death was by violence and the criminal agency of the defendant beyond a reasonable doubt. See *Commonwealth* v. *Webster*, 5 Cush. 295, 308-309 (1850). Although the case against the defendant is largely circumstantial it is well-settled that such evidence is competent to establish guilt beyond a reasonable doubt. *Commonwealth* v. *Fuller*, *supra*. *Commonwealth* v. *Rojas*, 388 Mass. 626, 629 (1983). *Commonwealth* v. *Montecalvo*, 367 Mass. 46, 54 (1975), and cases cited therein. To "conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim [or secrete it until advanced decomposition obscured the cause of death], and escape punishment despite convincing circumstantial evidence against him or her." *Wilkins* v. *State*, 96 Nev. 367, 374 (1980), citing *People* v. *Scott*, 176 Cal. App. 2d 458 (1959), appeal dismissed and cert. denied, 364 U.S. 471 (1960). See *Regina* v. *Onufrejczyk*, 1 All E.R. 247 (1955).

The jury had ample evidence from which they could reasonably conclude that Lisa met her death by violent means in the defendant's apartment on the evening of March 18, 1982, sometime after 7 P.M. The testimony of Patricia Thompson,

Earl Bethune, Curt Willis, and Debby Lewis all tended to show that Lisa was at the defendant's apartment at around 7 P.M. on that evening and that was the last time she was seen alive. Testimony by several witnesses, including that of Earl and Vanessa Bethune and Debby Lewis tended to establish that the defendant himself acknowledged Lisa's death in his apartment that evening. The defendant first told Earl that the large red-brown stain Earl noticed on the defendant's rug on March 19 was vomit, but later asserted it was a beer stain. Thomas Pagano testified that the defendant told him that the Commonwealth's evidence against him included "blood stains from Lisa's body" found on his apartment floor. The jury could infer from this evidence that the stain on the rug was Lisa's blood.

The jury could properly find that Lisa's death was not the result of suicide. Patricia Thompson testified that not only was Lisa happy and functioning well in all areas with excellent morale on March 18, but also that she determined that Lisa's outlook was positive enough for regularly scheduled counselling sessions to be terminated. Both Curt Willis, who spoke with Lisa at 6 P.M., and Debby Lewis, who talked with her at seven o'clock that night, said she sounded normal. Lisa had made plans to go to a party with Curt on the coming Friday and her mother indicated that Lisa was alert, friendly, and performing well during March. The jurors could infer that Lisa was not depressed or inclined toward self-destruction on March 18 and that she did not kill herself.

The jury could also reasonably infer that Lisa did not die of natural causes. She suffered no major illnesses and had undergone no surgical procedures except for the removal of a lump in her breast. There was no indication in the testimony of her mother, friends, and other people who knew her that she was in ill health. In fact, her mother testified that her health had been good. On September 24, 1981, Lisa had been given a complete physical examination and was found to be in good general health, aside from the lump. She also tested negative for diabetes on that date. Dr. Butt testified that based on his autopsy and the above information it was extremely

unlikely that Lisa died of natural causes. Moreover, the jury could properly infer that Lisa's death was not caused by accident. There was no evidence of accident. Dr. Butt testified that there was no evidence of major trauma to the body or broken bones, no pills were found in the stomach, and no large cranial hematomas. The defendant explained to his friends that she "was overdosed" by the hand of another, or "overdosed" herself. The jury were free to disbelieve this version of the events that evening. See *Commonwealth* v. *Campbell*, 378 Mass. 680, 689-690 (1979); see also *United States* v. *Systems Architects, Inc.*, 757 F.2d 373, 377 (1st Cir.), cert. denied, 54 U.S.L.W. 3223 (Oct. 8, 1985) ("The Government . . . need not exclude every reasonable hypothesis of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt").

b. *Agency*. There was also sufficient evidence for the jury to find criminal agency on the part of the defendant. A "web of convincing proof can be made up of inferences that are probable, not necessary." *Commonwealth* v. *Best*, 381 Mass. 472, 483 (1980). *Commonwealth* v. *Lanoue*, 392 Mass. 583, 590 (1984) (allowable inferences need not be necessary or inescapable). The jury could have found that, during January and February of 1982, the close, romantic relationship between the two had begun to cool, Lisa was pulling back and the defendant was disturbed and unhappy at the turn of events.[6]

From Lisa's letter and her statement to Patricia Thompson, the jury could infer that Lisa went to see the defendant on March 18, 1982, to end the relationship.[7] The jury could have believed that the defendant knew Lisa was seeing Curt regularly, that she did not wish to see the defendant, and that she

[6] These findings are supported by the testimony that during this period Lisa and the defendant were seen together less frequently and that she would turn down rides offered by him; that the defendant repeatedly expressed his concern about his lack of contact with Lisa, his desire to speak with her, his love for her, and that he could not bear to have the relationship broken off.

[7] The defendant contends that this testimony was admitted as evidence of Lisa's state of mind, relevant to the defendant's motive. He argues that the statement is insufficient to demonstrate that in fact she so informed the

felt the relationship was over. They could also infer that the defendant was still in love with her and wanted to see her very badly but that he also felt "used." This evidence permitted the jury to conclude that the defendant, being jealous, feeling "used," and unhappy and understanding that Lisa wanted to terminate their relationship, had a motive to kill her. From his own statements the jury could have concluded that he was in Lisa's presence when she died and from other evidence, that he was the only person present.

The jury, therefore, could have reasonably inferred that the defendant killed Lisa in his apartment on March 18, 1982, and immediately began his efforts to conceal her body. They could have believed that the defendant requested that Earl Bethune "alibi" for him and that the defendant told inconsistent stories concerning Lisa's condition when he saw her on March 18. There was ample evidence to support the conclusion that from the moment of her death to the time of its discovery, Lisa's body was either in the defendant's apartment, in the storage bin controlled by him, or in the trunk of his car. The jury could have considered the great length of time and manner in which the body was secreted as indicative of the defendant's attempts to conceal evidence of his criminal act.

In sum, therefore, the jury could infer that Lisa met her death at the hands of the defendant in his apartment and in his sole presence. They could infer that the manner in which the defendant killed her caused her to bleed and that she died in such a way that the defendant was prompted to seek an untruthful alibi and to secrete the body or conceal the cause of death.

c. *Malice*. Where the "crime charged is murder, the requisite mental state is malice aforethought." *Commonwealth* v. *Scanlon*,

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defendant. See *Commonwealth* v. *Borodine*, 371 Mass. 1, 8-9 (1976), cert. denied, 429 U.S. 1049 (1977). The jury, however, would have been warranted in inferring that Lisa had communicated her intent to break off the relationship based on comments to that effect in her letter to him. Additionally, if "the victim was willing to tell third persons that her relationship with the defendant had deteriorated and that she had told or would tell the defendant that their relationship would end, it is inferable . . . she communicated her feelings to the defendant." *Id.* at 8, citing *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 295-296 (1892).

373 Mass. 11, 18 (1977). We have already shown that the jury could have found that Lisa met her death at the hands of the defendant in his apartment on the evening of March 18, 1982, because of his dissatisfaction with the course of their love affair. On the basis of these findings the jury could infer that the defendant intentionally caused her death and that the requisite malice was therefore present. *Commonwealth* v. *Webster*, 5 Cush. 295 (1850). See *Commonwealth* v. *Forde*, 392 Mass. 453, 456 (1984); *Commonwealth* v. *Scanlon, supra; Commonwealth* v. *Mangum*, 357 Mass. 76, 85 (1970). Additional evidence exists from which the requisite malice can be found. The intent to inflict an injury may be inferred from, among other things, the condition of the body and the disposal of evidence. *Commonwealth* v. *Amazeen*, 375 Mass. 73, 81 (1978). The jury could properly have found that the nature and circumstances of the defendant's concealment of the body and its decomposed condition were indicative of his intent to harm Lisa. The defendant was the son of a funeral director and had helped his father with his work. Comments about a body's tendency to secrete fluids such as blood and vomit-like substances after death revealed his knowledge of a body's postmortem changes. His statement to Earl Bethune that he hoped the autopsy would not reveal anything, and the careful way the body was tied, compacted, and wrapped in two layers of plastic within a canvas bag and concealed for four months could properly be viewed by the jury as evidence that he injured Lisa intentionally and used his understanding of the decomposition process to cover up evidence which would reveal his intentional act, if the body was discovered soon after death.

2. *Pathologist's testimony*. The defendant contends that it was error to admit certain testimony of Dr. Butt since he could not determine time or cause of death to a reasonable medical certainty. The defendant alleges that Dr. Butt could not and did not testify to at least a degree of probability and instead testified only as to "possibilities." He maintains that the evidence was prejudicial because it allowed the expert as well as the jury to speculate. See *Hachadourian's Case*, 340 Mass. 81, 86 (1959); *Nass* v. *Duxbury*, 327 Mass. 396, 401-402 (1951). We disagree.

Dr. Butt acknowledged that the examples of causes of death he cited as consistent with his autopsy findings were not exhaustive and there were other ways Lisa could have died. He also acknowledged that each of those examples of causes of death could have been self-induced or could have occurred by accident. Of itself, the possibility that there could have been other causes of the victim's death does not render his opinion inadmissible. See *Commonwealth* v. *Tatro*, 4 Mass. App. Ct. 295, 305 (1976). It is, of course, true that when evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to be established by legitimate proof. *Commonwealth* v. *Salemme*, 395 Mass. 594, 601 (1985). *Commonwealth* v. *Fancy*, 349 Mass. 196, 200 (1965). *Commonwealth* v. *McLeod*, 394 Mass. 727, 747 (1985), and cases cited therein. As already noted, however, there was other evidence besides Dr. Butt's testimony upon which the jury could reasonably rely to infer that death was not the result of suicide or accident. See *Commonwealth* v. *McLeod, supra*.

Dr. Butt testified that the victim's death could have been caused by and was "consistent with" "[s]uffocation, smothering, injection of different drugs, poisons, carbon monoxide poisoning, drowning, and a large number of chemicals." Use of phrases "consistent with" and "could have" does not render Dr. Butt's testimony incompetent. See *Commonwealth* v. *Perez*, 357 Mass. 290, 304-305 (1970); *Commonwealth* v. *Donoghue*, 266 Mass. 391, 396 (1929); *Commonwealth* v. *Cantor*, 253 Mass. 509, 513 (1925); *Commonwealth* v. *A Juvenile*, 365 Mass. 421, 437 (1974), and cases cited. Cf. *Commonwealth* v. *Polian*, 288 Mass. 494, 501 (1934). Although such testimony is not evidence that death occurred in the manner stated, evidence " 'tending to show that there was nothing in the conditions disclosed at the autopsy inconsistent with the theory of the case based upon the other testimony offered by the Commonwealth . . . [is] competent.'. . . The 'other testimony' can be entirely circumstantial. . . . A jury could consider testimony of this character in excluding a hypothesis as to how a death was caused." *Commonwealth* v. *Burke*, 339 Mass. 521, 530-531 (1959), quoting *Commonwealth* v. *Cantor, supra*.

Neither is the testimony rendered speculative because the pathologist could not give an opinion on a specific cause of death. The significance of his opinion testimony was that the body's state of decomposition made it impossible to ascertain a cause of death with any more certainty and to eliminate death by disease or natural causes. Based on the discussion above, we conclude that it was not error to admit Dr. Butt's testimony. We observe that even had admission of this testimony been error, any possibility of prejudice was removed by prudent instructions by the judge to the jury prior to and during Dr. Butt's testimony as an expert witness.

3. *Request for instructions on manslaughter*. The defendant contends that the judge's charge to the jury allowed a reasonable juror to believe that failure of the defendant to obtain medical help for the victim could constitute murder in the second degree. He argues, therefore, that the failure of the judge to instruct on involuntary and voluntary manslaughter while permitting the jury to convict the defendant of murder for failure to act, was improper. He claims the judge further erred in declining to give a requested instruction clarifying that the law imposes no duty on the defendant to act.[8] We disagree and find no error.

The defendant's allegation that the judge's instructions permitted the jury to conclude the defendant could be convicted of murder in the second degree for failure to act focuses on portions of the charge stating that intent to kill "is not a necessary element of second degree murder" and that "malice in murder means a knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act." In assessing the sufficiency of jury instructions, we consider the charge in its entirety "to determine the 'probable impact, appraised realistically . . . upon the jury's factfinding function.'" *Commonwealth* v. *Richards*, 384 Mass. 396, 399-400 (1981), quoting

[8] The instruction requested by the defendant was: "You may not find the defendant guilty of any crime by reason of any failure or omission to act because the law imposes no duty on the defendant to take any action to preserve the life of another."

United States v. *Wharton*, 433 F.2d 451, 457 (D.C. Cir. 1970). See *Commonwealth* v. *Silva*, 388 Mass. 495, 507 (1983).[9]

Reviewing the charge as a whole, we are satisfied that no juror could reasonably infer that failure to act was a permissible basis for a second degree murder conviction in this case. There was, therefore, no error in the judge's refusal to instruct on manslaughter. Similarly, the judge did not err in denying the defendant's request for an instruction clarifying the defendant's lack of obligation to act.

A judge "may not charge on a hypothesis not supported by the evidence," *Commonwealth* v. *Vanderpool*, 367 Mass. 743, 746 (1975); *Commonwealth* v. *Campbell*, 352 Mass. 387, 392 (1967), and no view of the evidence, resolving all reasonable inferences in favor of the defendant, *Commonwealth* v. *Vanderpool, supra*, permitted a finding of either involuntary or voluntary manslaughter.

4. *Exclusion of evidence.* At trial, Earl Bethune testified that in April, 1982, the defendant said that "someone told him

[9] The judge instructed the jury that "to prove murder in the second degree the Commonwealth must establish beyond a reasonable doubt . . . [n]umber one: That there was an *unlawful killing* of Lisa Belmonte by this Defendant" (emphasis added). This was repeated. In defining unlawful killing, the judge said, "The term unlawful killing refers to the absence of justification or excuse. For example, a killing is justified if authorized by law, as during a lawful battle in a lawful war or by a person acting in self-defense. If a killing is not excused in situations such as these however, the killing is unlawful." The judge then stated the following passage twice. "Further . . . the evidence must not only prove beyond a reasonable doubt a *death by violence*, but must also exclude — and that is exclude — beyond a reasonable doubt death by suicide, natural causes and accident" (emphasis added). The judge went on to state that "[a]n injury to another human being is not unlawful when occasioned by acts of misfortune. The burden of proof is on the Commonwealth to prove beyond a reasonable doubt *that the conduct of this Defendant was unlawful*; that *he caused injury by violence to the victim while she was alive*. If the Commonwealth fails in its burden to prove that the Defendant's actions were unlawful and that the *Defendant caused injury by violence to the victim while she was alive*, then you need not proceed further, but must return a verdict of not guilty" (emphasis added). As part of the definition of malice, the judge stated that it "is an *intention to inflict injury* without legal justification. Whether a killing is actually committed with malice aforethought is determined from the nature and the quality of the act which attends the killing" (emphasis added).

that [Lisa] was seen in New Hampshire hijacking trucks." Later, the defendant sought to introduce evidence that his father had been told this by Lynn police officer Clara Zamejtis in April, 1982, and that his father had communicated the content of the discussion with Officer Zamejtis to the defendant. The defendant maintains that the judge wrongfully excluded this evidence, since it was offered to show the defendant's state of mind when he made the statement which would tend to rebut any inference that the defendant's remark to Earl Bethune was evidence of consciousness of guilt. See *Commonwealth* v. *Bohannon*, 376 Mass. 90, 94 (1978). This argument has some merit. We are satisified, however, that there is ample and substantial additional evidence of consciousness of guilt in this case to remove any possibility of prejudice to the defendant even if the excluded testimony might have served to blunt an inference that the defendant's comment to Earl Bethune demonstrated consciousness of guilt.[10]

5. *Handwriting exemplars*. The defendant contends that the admission of the letter purportedly written by him to Lisa constituted prejudicial error. He argues that in complying with the court order to furnish handwriting exemplars, he was compelled to violate his privilege against self-incrimination. We shall treat this claim as an invocation of the privilege under the Fifth Amendment to the United States Constitution.[11]

The handwriting exemplars were produced in the presence of a State police trooper. As part of the process, the defendant was required to copy the following two sentences, which involved his selection of the term "right" or "left" hand in each sentence he rewrote:

[10] We note that had the defendant's father's testimony been admitted and been believed, the jury could nevertheless have reasonably concluded that the defendant had repeated Officer Zamejtis' information to Earl Bethune knowing Lisa was already dead, intending to disguise his own guilt.

[11] At trial, the defendant objected to the admission of the handwriting exemplar and moved to strike the handwriting expert's testimony on Fifth Amendment grounds. On appeal, however, the defendant does not specify whether he alleges error under the Federal or State Constitutions, or both, and simply claims violation of his "privilege against self-incrimination." We consider only the Federal constitutional question as no objection under the Massachusetts Constitution was raised at trial.

"The above are samples of my handwriting with my (right/left) hand. I normally write with my (right/left) hand."

It is these sentences which the defendant maintains were testimonial and violative of his privilege against self incrimination.

It is established that the privilege of an accused not to be compelled to be a witness against himself protects only against the compulsion of incriminating "communications" or "testimony" and does not operate against compulsion "which makes a suspect or accused the 'source of real or physical evidence.'" *Commonwealth* v. *Brennan*, 386 Mass. 772, 776 (1982), quoting *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). It is equally well-settled that handwriting constitutes "real or physical" evidence and thus does not come within the constitutional privilege protecting against compelled communications. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967). A "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege]." *Id.*, citing *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967).

This court has held that "'testimonial' evidence, for the purpose of Fifth Amendment analysis, is evidence which reveals the subject's knowledge or thoughts concerning some fact." *Commonwealth* v. *Brennan*, *supra* at 778. Arguably, under this definition, the information sought by requiring the defendant to choose between "left" and "right" was more than mere "physical evidence" of the identifying characteristics of his penmanship,[12] since the defendant was compelled to reveal his

[12] The phrase "[t]he above are samples of my handwriting with my *right* hand" may also be testimonial according to the *Brennan* definition. It reveals the defendant's knowledge concerning a fact, which is, that he wrote it with his right hand. The Commonwealth, however, was possessed of that knowledge as well, since a State trooper witnessed the defendant's execution of the handwriting exemplar and testified at trial. This evidence is also very similar in kind to other compelled behavior found to be nontestimonial, as in field sobriety tests, where an accused is forced to exhibit his physical characteristics for observation by a police officer. See *Commonwealth* v. *Brennan*, *supra* at 779. Even if we considered the information that the defendant completed the handwriting exemplar with his right hand testimo-

subjective knowledge of his "righthandedness." To compel disclosure of knowledge of this sort is different from requiring the defendant to furnish an exemplar which discloses only the manner in which he forms his words and letters. See *United States* v. *Campbell*, 732 F.2d 1017, 1021-1022 (1st Cir. 1984) (to require the defendant to produce a handwriting exemplar by taking dictation would compel him to reveal his spelling. The resulting implied message, "[t]his is how I spell it," would be testimonial. "[S]pelling is an intellectual process as distinguished from the pure physical habit or characteristics that make handwriting demandable"). Cf. *United States* v. *Pheaster*, 544 F.2d 353, 372 (9th Cir. 1976), cert. denied sub nom. *Inciso* v. *United States*, 429 U.S. 1099 (1977) (spelling and penmanship are both acquired through learning and both may tend to identify a defendant as author of a document, yet neither involve protected communication).

Even evidence which is both testimonial and compelled is not protected by the privilege if such evidence is "trivial" and does "not incriminate." *Commonwealth* v. *Hughes*, 380 Mass. 583, 590, cert. denied, 449 U.S. 900 (1980). See *id.*, citing *Fisher* v. *United States*, 425 U.S. 391, 411-413 (1976). We conclude that the defendant's declaration of his righthandedness is not protected under this standard.

The informational aspects of the exemplar were trivial since what is in issue is not whether the defendant writes with his right or left hand. *Commonwealth* v. *Hughes, supra*. *Fisher* v. *United States, supra*. Neither is the information that the defendant usually writes with his right hand incriminating. The defendant's righthandedness has absolutely

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nial evidence, it is clearly trivial and nonincriminating and therefore unprotected by the Fifth Amendment privilege. The question of which hand the defendant actually used to complete the exemplar was "a foregone conclusion" having been observed and thus added "little or nothing" to the Commonwealth's information. See *Fisher* v. *United States*, 425 U.S 391, 411 (1976); *Commonwealth* v. *Hughes*, 380 Mass. 583, 590, cert. denied, 449 U.S. 900 (1980); and discussion *infra* at 364-365.

no direct bearing on his guilt or innocence in this case. This is not a case where a weapon was used in a manner indicating a righthanded or lefthanded assailant, nor as in *Commonwealth* v. *Hughes, supra*, a case where the defendant is compelled to reveal the existence of a fact which is an essential element of the Commonwealth's case (possession of a gun). The cases cited in *Hughes* similarly involve situations where the nexus between the incrimination of the defendant and the testimonial evidence compelled from him was more direct and immediate than in the instant case. *Id.* at 590-592. See, e.g., *United States* v. *Campos-Serrano*, 430 F.2d 173, 176 (7th Cir. 1970), cert. denied, 404 U.S. 1023 (1972) (defendant indicted for knowing possession of forged alien registration card. To produce the card was tantamount to compelled production of "the crime itself"). Therefore, even if the declaration of righthandedness is conceded to be testimonial, the compelled disclosure of this information does not violate the Fifth Amendment.

6. *Bloodstains; benzidine reagent test.* A Department of Public Safety chemist testified, over the defendant's objection, that he obtained positive reactions for the presence of blood when he performed a benzidine reagent test for blood in the trunk of the defendant's Maverick and on the floor of the basement storage bins number 7 and number 8. He could not determine how long the blood had been present, or whether any of the blood was human or animal. Further tests were performed to establish whether in fact the blood was human, but the results proved inconclusive.

This court has upheld admission of test results evidencing the presence of blood where it has not been possible to ascertain whether the blood is human or animal. We have said that this lack of conclusiveness is a matter of the weight of the evidence and not of its admissibility. *Commonwealth* v. *Murray*, 359 Mass. 541, 549 (1971). In cases both before and after *Murray*, however, similar evidence has been held to be inadmissible. See *Commonwealth* v. *Healy*, 393 Mass. 367, 382 (1984); *Commonwealth* v. *Horton*, 376 Mass. 380, 396-397 (1978), cert. denied sub nom. *Wideman* v. *Massachusetts*, 440 U.S. 923 (1979); *Commonwealth* v. *Burke*, 339 Mass. 521, 535

(1959). We do not decide whether the facts of the case would be controlled by *Murray* or *Burke* since the defendant suffered no prejudice from the admission of the evidence. The chemist's testimony was merely cumulative. Fumicello and Bates both testified that they saw a dark, sticky liquid on the floor of bin number 8, seeping from bin number 7 and Bates' statement that the odor resembled that of a dead body, was evidence from which the jury could infer the stain in the bins was blood. Moreover, the fact that Lisa's body was stored for at least some length of time in the trunk of the defendant's Maverick is not contested. This fact, combined with testimony that the body was covered with bloodlike secretions, permitted the inference that the stain in the trunk was Lisa's blood. Any error in the admission of the chemist's testimony under these circumstances was not prejudicial. See *Commonwealth* v. *Sazama*, 339 Mass. 154, 159 (1959).

7. *Photographs*. Postmortem photographs were admitted depicting the badly decomposed body of the deceased in the fetal position in which it had been bound. Portions of the bloodstained plastic bag in which the body had been wrapped were visible. The defendant argues that it was error to admit these pictures as they were inflammatory and of no probative value.

The admission of photographs is committed to the sound discretion of the trial judge and we have rarely reversed a conviction because of the production of photographs of a victim. *Commonwealth* v. *Westmoreland*, 388 Mass. 269, 279 (1983), and cases cited. See *Commonwealth* v. *Richmond*, 371 Mass. 563, 564 (1976); *Commonwealth* v. *Allen*, 377 Mass. 674, 679 (1979). This is not a case where the photographs showed the body as altered in the course of an autopsy, which this court has said may present special problems. *Commonwealth* v. *Bastarache*, 382 Mass. 86, 106 (1980). The fact that photographs may be inflammatory does not bar their admission if they possess evidentiary value on a material matter. *Commonwealth* v. *Stewart*, 375 Mass. 380, 385 (1978). *Commonwealth* v. *Allen, supra*. In this case, the state in which the body was found, bound into a position which would best effectuate transportation and concealment, as well as its advanced

state of decomposition, was evidence of malice and consciousness of guilt and thus probative of guilt. Moreover, the pictures were relevant to assist the jury in understanding the pathologist's testimony, particularly as to the fact that the decomposition prevented establishing precise cause and time of death. See *Commonwealth* v. *Todd*, 394 Mass. 791, 796 (1985) (although a pathologist testifies as to cause of death, oral testimony describing the victim's injuries may be supplemented with photographs). The judge was careful to give a limiting instruction when the photographs were presented to the jury, see *Commonwealth* v. *Repoza*, 382 Mass. 119, 128-129 (1980), and diligently reviewed the photographs, eliminating one as redundant, see *Commonwealth* v. *Todd, supra*. The judge did not abuse his discretion in admitting the photographs.

The defendant further objects to the admission of a photograph of Lisa taken while she was alive. He contends that the contrast between the decedent's "youthful and smiling face" and the "gruesome" visage in the postmortem photographs was inflammatory and prejudicial. We cannot agree that the judge abused his discretion in the circumstances. The photograph was relevant on the question of identification and as tending to show that death due to ill health or suicide was unlikely. Although during the trial the defendant offered to stipulate to the indentity of the body to avoid admission of the picture, and subsequently did so stipulate, a judge may generally "admit relevant evidence even if a party has agreed to stipulate to the fact that the offered evidence tends to prove." *Commonwealth* v. *Bastarache, supra*. See *Commonwealth* v. *Todd, supra*, citing *Commonwealth* v. *Stirling*, 351 Mass. 68, 71 (1966).

8. *Motion to suppress*. Prior to trial, the defendant moved to suppress certain statements including those allegedly made by him over the telephone to Officer Swiniarski. The motion was denied and the statements were later admitted at trial. The defendant argues that the remarks were involuntary and violated his due process rights and his privilege against self incrimination.

The motion judge's finding that the defendant's statements were not made during custodial interrogation and that no Miranda rights therefore attached was clearly warranted and

is dispositive. Miranda warnings are necessary only for custodial interrogations. *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495 (1977). *Commonwealth* v. *Bryant*, 390 Mass. 729, 736 (1984). The defendant was not subjected to custodial interrogation and therefore his reliance on cases concerning continued interrogation in custodial situations where an accused has asserted the right to remain silent, e.g., *Commonwealth* v. *Jackson*, 377 Mass. 319, 326 (1979); *Commonwealth* v. *Forde*, 392 Mass. 453, 455 (1984), is inapposite. Cf. *Commonwealth* v. *Burke*, 339 Mass. 521, 532-533 (1959).

There remains the question whether certain of the defendant's statements to Officer Swiniarski were voluntary. At one point in the telephone conversation the defendant said, "I don't want to talk about it." See *Commonwealth* v. *Mahnke*, 368 Mass. 662, 679 (1975), cert. denied, 425 U.S. 959 (1976). The motion judge found that the defendant's statements later on in the conversation in no way "contravene[d] due process voluntariness" and were free of coercion. The motion judge had an ample basis for finding that nothing in the exchange between Officer Swiniarski and the defendant resulted in the will of the defendant being "overborne" so that what he said could be considered involuntary. See *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

9. *Relevance of evidence of no Miranda warnings to question of voluntariness before the jury*. The motion judge found that the defendant's statements made during Sergeant Jackson and Chief Courtney's visit to the Nadworny family home on July 20, 1983, were not made during custodial interrogation and that no right to Miranda warnings attached.

The defendant now argues that the trial judge committed prejudicial error in interrupting his cross-examination of Sergeant Jackson[13] and prohibiting Jackson from answering the

[13] In his brief, the defendant mistakenly states that his objection to the trial judge's cross-examination was "of the police officer who obtained the incriminating statements over the telephone." That officer was Swiniarski. The substance of the brief, and the defendant's citations to the transcript, make clear that his objection concerns the cross-examination of Sergeant Jackson.

question, "And yet when you spoke to [the defendant], you didn't advise him of his right to remain silent in any way?" The defendant alleges that the question whether Miranda rights had been given during Jackson's colloquy with the defendant was relevant to a jury determination of voluntariness. We find no error.

We agree with the motion judge that the portion of the defendant's conversation with Sergeant Jackson and Chief Courtney up through the defendant's response that Lisa was in the trunk, was not custodial interrogation. The motion judge found that the conversation took place at the defendant's family's home, at the defendant's request, and involved an officer who knew the defendant and his family well. See *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966); *Oregon* v. *Mathiason, supra*; and see discussion in *Commonwealth* v. *Bryant*, 390 Mass. 729, 736-739 (1984).

During a bench conference, the trial judge acknowledged that the question of voluntariness was a live issue before the jury and ruled that the entire conversation between Sergeant Jackson and the defendant could be admitted in evidence on the issue of voluntariness. This included defense counsel's question, "Before you asked [the defendant] where Lisa Belmonte was, did you tell him of the thought that was in your mind, that he was a suspect of some kind?" to which Jackson replied, "No." Jackson's response to the defense counsel's question about whether he apprised the defendant of his right to remain silent early in the conversation was the only information excluded. The judge ruled that the question whether Miranda warnings had been or should have been given at the outset of the conversation had been litigated during the proceedings on pretrial motions and decided by the motion judge. While this court has said that evidence bearing on whether Miranda warnings were given is relevant in determining whether a confession is voluntary, such observations were made in cases involving custodial interrogation where Miranda warnings are required. See *Commonwealth* v. *Chung*, 378 Mass. 451, 458-459 n.9 (1979); *Commonwealth* v. *Tavares*, 385 Mass. 140, 153 n.19, cert. denied, 457 U.S. 1137 (1982).

Where statements are made during conversation where Miranda warnings are not required, it is within the judge's discretion to exclude testimony concerning the giving or failure to give Miranda warnings as long as the judge preserves the basic issue of voluntariness for the jury. We conclude that the requisites of *Commonwealth* v. *Harris*, 371 Mass. 462, 469 (1976), were complied with.

10. *Request for instructions: voluntariness.* The defendant contends that the trial judge erred in refusing to give his requested instruction on the question of voluntariness of incriminating statements. Specifically, he maintains that he requested "trickery" and "cajoling" be among the factors the jury be required to consider on this issue and that the absence of reference to these terms in the instructions given was error. The judge was obligated to instruct the jury that "the Commonwealth has the burden of proving beyond a reasonable doubt that the [statements were] voluntary and that the jurors must disregard [them] unless the Commonwealth has met its burden." *Commonwealth* v. *Tavares*, *supra* at 152. Considering the judge's charge as a whole, we are satisfied that he met this obligation See *Commonwealth* v. *Lowe*, 391 Mass. 97, 110-111, cert. denied, 105 S. Ct. 143 (1984). Moreover, there was no evidence of "trickery" or "cajoling" to indicate that the requested instruction might have been required. Nevertheless, the judge's charge did discuss "coercion or force, either physical or psychological." There was no error.

11. *Jury instruction: consciousness of guilt.* The defendant asserts that the judge failed to instruct the jury concerning the proper consideration of evidence of consciousness of guilt. He alleges that the judge committed error by neglecting to charge that the defendant may not be convicted on such evidence alone, and that the judge failed to satisfy this court's directives set out in *Commonwealth* v. *Toney*, 385 Mass. 575, 585 (1982). There was no error.

Commonwealth v. *Toney*, *supra*, states that a judge should instruct a jury "(1) that they are not to convict a defendant on the basis of evidence of flight or concealment alone, . . . and (2) that they may, but need not, consider such evidence as one

of the factors tending to prove the guilt of the defendant" (citations omitted). The judge's instructions concerning "false statements and concealment" are set out in full in the margin.[14] The charge, as given, adequately cautioned the jury "concerning the equivocal nature" of such evidence. *Id.* In *Toney*, this court recognized that concealment, flight, and other such acts "may often be prompted by something other than feelings of guilt . . . [and] that feelings of guilt may be present without actual guilt in neurotic, as well as so called 'normal,' people." *Id.* The judge here did address these concerns. Although the instruction given in the case at bar was not a model of clarity regarding the fact that a defendant may not be convicted on consciousness of guilt evidence alone, the instruction contained the substance of what we required in *Toney*. The judge stated that "[u]nder no circumstances may you presume the Defendant guilty from his false statements or concealment" and that "[y]ou should consider and weigh evidence of false statements and concealment . . . *in connection with all the other evidence* in this case . . ." (emphasis added).

The defendant also contends that the judge erred in refusing to give a requested instruction that acts and statements indicating consciousness of guilt be knowingly made, in that they must follow and not precede the crime. There was no error.

[14] The judge instructed as follows:

"False statements and concealment, if in fact you should find there were false statements and concealment — by a person after a crime has been committed, or after a defendant has been accused of a crime may be motivated by a variety of factors which are actually consistent with innocence. Such evidence does not create an inference of guilt, nor does the person's false statement or concealment necessarily reflect feelings of guilt. Furthermore, since innocent persons sometimes have feelings of guilt, such feelings do not necessarily reflect actual guilt. While you may consider false statements and concealment as one circumstance tending to show feelings of guilt, and while you may also consider feelings of guilt as evidence tending to show actual guilt, you are not required to do so. Under no circumstances may you presume the Defendant guilty from his false statements or concealment. You should consider and weigh evidence of false statements and concealment, if you find, in fact, that there is any by this Defendant in connection with all the other evidence in this case, and give it such weight as in your judgment it is fairly entitled to receive."

While we do not decide whether such an instruction was required, we observe that the judge referred to "false statements and concealment" at the outset of this instruction in the context of being "*after* a crime has been committed, or *after* a defendant has been accused of a crime" (emphasis added).

Additionally, the defendant maintains that the amount of consciousness of guilt evidence in this case required the judge to institute special procedures to insure the "legitimate use" of such evidence and to control prejudice. He argues that it constituted prejudicial error for the judge to deny his motion in limine, motion concerning order of trial, motion to bifurcate, and his request for a limiting instruction at the close of the Commonwealth's opening, which all concerned the introduction of evidence of consciousness of guilt. As discussed, the judge adequately instructed the jury on this matter in his charge. No additional procedures were required under the circumstances. There was no error.

12. *Denial of motion to dismiss the indictment.* The defendant claims that his motion to dismiss the indictment was erroneously denied as the only evidence of cause of death was hearsay given by a State police corporal and "impermissible and prejudicial information as to bloodstains" (i.e., the positive benzidine reagent test which did not determine whether the blood was human). We disagree. As a "general rule . . . a court should not inquire into the adequacy or competency of the evidence upon which an indictment is based . . . [except] when it appears that the integrity of the grand jury process has been impaired." *Commonwealth* v. *Salman*, 387 Mass. 160, 166 (1982), and cases cited. An indictment based in whole or in part on hearsay evidence before a grand jury may stand. *Commonwealth* v. *St. Pierre*, 377 Mass. 650, 655 (1979). The defendant has failed to show that the integrity of the grand jury was impaired, or that "extraordinary circumstances" existed which might render the indictment vulnerable. See *id.* at 656, quoting *Commonwealth* v. *Comins*, 371 Mass. 222, 224 (1976), cert. denied, 430 U.S. 946 (1977).

13. *Conclusion.* Neither is there any basis to sustain the defendant's allegation of substantial risk of a miscarriage of

justice through the combined effect of several of the alleged evidentiary errors.

Judgment affirmed.

Petition for Rehearing

January 8, 1986

Mr. Chief Justice Edward F. Hennessey
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Ma. 02108

Re: *Commonwealth* v. *Nadworny*, 396 Mass. 342 (1985)
Subj: Petition for Rehearing

Dear Mr. Chief Justice Hennessey:

The defendant respectfully petitions this court for rehearing pursuant to Mass. Rule App. Proc. 27. On December 11, 1985, this court affirmed the defendant's conviction for murder in the second degree. The court has allowed the defendant's motion for extension of time to file this petition to January 8, 1986.

Involuntary Manslaughter

With respect, the court's opinion does not meet the defendant's claim that he was entitled to an instruction on involuntary manslaughter.

The court states (immediately after treating the defendant's claim that an involuntary manslaughter instruction was required on a theory of the defendant's failure to act) that "no view of the evidence, resolving all reasonable inferences in favor of the defendant . . . permitted a finding of . . . involuntary . . .

manslaughter." *Commonwealth* v. *Nadworny*, 396 Mass. 342, 361 (1985).

With respect this conclusion is plainly wrong. First, it is wrong because it appears to be premised on a non sequitur — the court says that because a "failure to act" theory of liability was not allowed by the charge as to second degree murder, there was no error in not offering a manslaughter instruction on the basis of failure to act. Second, it is wrong because it fails to recognize evidence supportive of several other theories of involuntary manslaughter. Third, it was wrong because it partakes of errors of fact in the opinion.

I. *Non Sequitur*

The defendant had argued, *not only in part*, that in as much as the judge had permitted the jury to convict on second degree murder on a theory of the defendant's failure to obtain medical help, the judge should have instructed on involuntary manslaughter on the same theory, "according to the degree of danger attending it," a jury question. *Commonwealth* v. *Pierce*, 138 Mass. 165, 178 (1884). The court responded to this manslaughter argument by noting that the charge on second degree murder required a finding of death by means of "*violence*." *Commonwealth* v. *Nadworny*, at 361 n.9. Therefore, "no juror could reasonably infer that failure to act was a permissible basis for a second degree murder conviction in this case." *Id.* at 361. The court then concluded, "[t]here was, therefore, no error in the judge's refusal to instruct on manslaughter. (See court's analysis on issue commencing on page 360.) The fact that the judge may have precluded a second degree murder conviction on the basis of a failure to act does not respond to the issue of whether there was evidence to support a manslaughter instruction on that theory.

II. *Other Theories*

Furthermore, a conclusion that a theory of failure to act was precluded, does not respond in the least to whether there was evidence which required an involuntary manslaughter instruction on any other theory. There was evidence, and there were other theories as demonstrated below — namely theories of (1) recklessness, of (2) unintended death by reason of battery, and of (3) failure to act, or of the undertaking of rescue. See Defendant's Brief pp. 66-68.

III. *Errors of Fact*

The defendant suggests that the court's failure to fully consider the several theories supporting an involuntary manslaughter instruction was not only as a result of the court's narrow approach to the issue, tied as it was to the second degree murder analysis, but was by errors of significant fact: one clear error in the recitation of facts, and, an omission.

The first is in the court's rendition that:

> The defendant telephoned Debby about 10 p.m. The defendant told her that Lisa overdosed, that she had gone into convulsions, that he tried to *stop* her, but that if he had called an ambulance and she died, the Belmontes would blame him.

Commonwealth v. *Nadworny,* at 350-351. (Emphasis added) The evidence was that the defendant had said that he had tried to *save* her. See Defendant's Brief p. 14 and Commonwealth's Brief p. 23.

The second was the court's failure to note that in the call that Curt Willis received from Lisa she told him that she "was

going to do something that he wouldn't approve of," Defendant's Brief pp. 8-9, and that "Willis had told her there were only two things that he would not approve of, taking drugs and seeing Billy, the defendant. (vll pp120-121)" *Id.* at 9. These errors of fact were significant as demonstrated below.

Theories of Involuntary Manslaughter and The Evidence

(1) *Reckless Overdose*:

While it is true, as the court stated, that "[t]he jury was free to disbelieve" the defendant's explanation that Lisa "'was overdosed' by the hand of another," *Commonwealth* v. *Nadworny,* at 356, the jury was equally free to believe that the defendant was that "other." The jury was free to take so much of the defendant's statement to this effect — to believe that he had administered or provided the drugs.

Furthermore, they could have found an overdose by believing Dr. Butt's original findings of needle marks, and his testimony that death was consistent with drugs or chemicals. They were free to believe that the lack of the presence of any drug or chemical trace, however sophisticated the analysis, was by reason of the processes of decomposition. There was much evidence to support this rationale for the lack of trace findings — both in the prosecution and defense cases. (See e.g. Defendant's Brief, p. 28, Dr. Butt's testimony that several types of drugs "would not be detectable by reason of decomposition," and that a "wide range of drugs, would be metabolized by the bacteria that live in the body after death.") The court's recitation that "all of the drugs tested for could be expected to have registered trace amounts if present," *Commonwealth* v. *Nadworny,* at 352, does not dispose of the jury's prerogative to find that drugs had been the cause of death, and, that for the reasons mentioned, they could not be discovered.

Finally (although the court failed to mention it), the fact that Lisa said she was going to do something that Curt Willis would not approve of, and that that something could have been the taking of drugs (and here at the hand of the defendant), was a fact for the jury supportive of this theory.

(2) *Battery — Unintended Death*:

The court's satisfaction that the jury could not have found that death was by other than violent means, far from putting to rest the concerns of the necessity of an involuntary manslaughter instruction, serves to further point out the need — violence (battery) may be the cause of an unintended death constituting involuntary manslaughter. See *Commonwealth* v. *Campbell,* 352 Mass. 387, 398-399 (1967) (Choking of victim causing death did not preclude involuntary manslaughter instruction. "We cannot accept the Commonwealth's contention that no instruction on manslaughter was necessary . . . . [W]e cannot agree that Campbell's conduct requires that malice be implied.") On the basis of the evidence the defendant could have committed a battery as Mr. Justice Liacos appeared to suggest in his query of the Commonwealth from the bench during oral argument. This required an involuntary manslaughter instruction. *Id.* (The jury could have found that the lack of the presence of trauma at the cite of the battery was explained by the effects of decomposition.)

Alternatively (as the court noted), Dr. Butt testified that death was consistent with "suffocation" or "smothering." *Commonwealth* v. *Nadworny,* at 359. On the evidence, the jury could have believed that the defendant, in frustration, intending merely to frighten and intimidate Lisa into staying with him, choked her with his hands, or smothered her with a pillow (or other object freely available to him). See *Commonwealth* v. *Campbell, supra.* An unintended death in the commission of

a battery is involuntary manslaughter. As this court has stated, "manslaughter is simply a battery that causes death." *Id.* at 399.

"The [constitutional] burden of proof is on the Commonwealth to prove every element of the offense charged." *Commonwealth* v. *McCauley,* 355 Mass. 554, 559 (1969). Here the Commonwealth's own evidence fairly raised the issue of involuntary manslaughter. "If on any view of the evidence in a prosecution for murder the issue of manslaughter is open, it must be submitted to the jury," *id.*, and the Commonwealth must carry its burden of proof beyond a reasonable doubt as to each element. *Cf. Commonwealth* v. *A Juvenile,* 396 Mass. 108, 113 (1985).

(3) *Failure to Act — Undertaking Rescue*:

On the evidence, including the statements attributed to the defendant, the jury could have found that the defendant, either (1) having provided Lisa with the drugs (or having injected her) failed to summon help (having a duty to do so by reason of having so placed her in peril, *Commonwealth* v. *Bianco,* 388 Mass. 358, 371, n.2 (Liacos, J., dissenting)), or (2) discovering her in a perilous condition, undertook for selfish or untoward reasons to *save* her himself rather than summon appropriate aid.

Additionally, and independent of whether or not the defendant was the agent of drugs, the jury could have found that undertaking rescue in these circumstances not only precluded appropriate aid, but was reckless. The court's misstatement of fact that the defendant had tried to "*stop*" Lisa (rather than *save* her) is significant, for had the defendant tried to stop her no reckless undertaking of personal rescue by treatment could have occurred.

Conclusion

The defendant respectfully suggest that the court has taken a mistakenly myopic view in its involuntary manslaughter analysis. Although the court professes to have viewed the evidence in the light most favorable to the defendant on the issue of the necessity of an involuntary manslaughter instruction, it truly has not. The defendant implores this court to reconsider its opinion from this perspective.

Respectfully submitted,

By his attorneys,

John J. Jennings
Frawley & Frawley
56 Central Avenue
Lynn, Ma. 01901
Tel. No. 595-3333

Charles M. Burnim
508 Donahue Building
Beacon Hill
41 Temple Street
Boston, Ma. 02114
Tel. 723-4700 x614

Certificate of Service

I, Charles M. Burnim, Esq., hereby certify that I have caused a copy of the foregoing to be served upon Dyanne Klien Polatin, Assistant District Attorney, by mailing the same to her, postage prepaid, at Office of the District Attorney, Masonic Building, 70 Washington Street, Salem, Ma. 01907, this January 8, 1986.

Under the penalties of perjury.

Charles M. Burnim
508 Donahue Building
Beacon Hill
41 Temple Street
Boston, Ma. 02114
(617) 723-4700 x614

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

ROOM 1412 COURT HOUSE

BOSTON, MASSACHUSETTS 02108

(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

February 10, 1986

Charles M. Burnim, Esq.
508 Donahue Building
Beacon Hill
41 Temple Street
Boston, MA 02114

John J. Jennings, Esq.
Frawley & Jennings
56 Central Avenue
Lynn, MA 01901

Re: Commonwealth vs. William Nadworny
Supreme Judicial Court No. SJC-3873

Your Petition for Rehearing in the above captioned appeal has been considered by the court and is denied.

Very truly yours,

Dolores G. Dupré
for Jean M. Kennett, Clerk

c.c.: Robert J. Bender, Asst. Dist. Atty.
Dyanne Klein Polatin, Asst. Dist. Atty.
Essex County D.A.'s Office
70 Washington Street
Salem, MA 01970

COMMONWEALTH OF MASSACHUSETTS

ESSEX, to wit:

At the SUPERIOR COURT, begun and holden at Salem, within and for said County of Essex, on the First Monday of May in the year of our Lord one thousand nine hundred and eighty-three THE JURORS for the Commonwealth of Massachusetts upon their oath present, that

William Nadworny

of Lynn in said County of Essex, on a date between March eighteenth and July nineteenth in the year of our Lord one thousand nine hundred and eighty-two at Lynn in the County of Essex aforesaid did assault and beat Lisa Belmonte, with intent to murder her, and by such assault and beating did murder Lisa Belmonte against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.

A TRUE BILL:

/s/ Kevin M. Burke	/s/ William A. Vachon
District Attorney.	*Foreman of Grand Jury.*

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DEPARTMENT
NO. 06060

COMMONWEALTH)
VS) BILL OF PARTICULARS
WILLIAM NADWORNY)

Now comes the Commonwealth in the above entitled matter and specifies the following in regards to the indictment charging the defendant with Murder:

1. The murder occurred sometime between approximately 6:00 p.m., on March 18, 1982 when the victim, Lisa Belmonte, was last seen alive and approximately 3:00 p.m., on July 19, 1982 when the victim's body was found. The Commonwealth is unable to specify further as to the time of the murder.
2. The Commonwealth is unable to specify as to the exact location where the murder occurred.
3. The defendant did with deliberately premeditated malice aforethought murder Lisa Belmonte in a manner which cannot be precisely determined due to the advanced state of decomposition of the victim's body when it was discovered concealed in the trunk of a motor vehicle owned by the defendant. The Commonwealth is unable to specify further as to the manner and means of the murder.

FOR THE COMMONWEALTH

/s/

FREDERICK B. McALARY
ASSISTANT DISTRICT ATTORNEY
for the Eastern District
One Brown Street Court
Salem, Massachusetts 01970
(617) 745-6610

PORTIONS OF DEFENDANT'S REQUESTS FOR INSTRUCTIONS.

. . . . . .

52. Now manslaughter. Within these indictments which charge first degree murder, there is, although not expressly mentioned in the statute, a lesser contained crime of manslaughter. Manslaughter is the unlawful killing of one human being by another, without malice aforethought. That is the primary distinction to remember between murder and manslaughter. Murder requires an unlawful killing, as does manslaughter, but murder requires an unlawful killing with malice aforethought. Manslaughter requires it to be with malice aforethought.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT
CRIMINAL ACTION
No. 6060

COMMONWEALTH

vs.

WILLIAM NADWORNY

FINDINGS AND RULING
ON MOTION TO SUPPRESS

On July 19, 1983, Lynn Police Officer Swiniarski, a patrolman, was on cruiser duty in Lynn. While on duty he was notified to go to 798 Washington Street, Lynn, the home and funeral establishment of Richard Nadworny.

Swiniarski knew the Nadworny family well. The family included Richard Nadworny's son, the defendant.

At the home, he spoke to defendant's parents.

At this time and for some peiod [*sic*] before, Swiniarski had been investigating the case of a missing person. The missing person was Lisa Belmonte, age about 17. Swiniarski knew that Lisa and defendant had been going together; that Lisa's family did not approve of the relationship; that Lisa's family contended that defendant had secreted Lisa.

As a result of talking to defendant's father, the officer went to 95 New Park Strett [*sic*], Lynn. He arrived there at about 7 p.m. After talking to several people there, joined by another policeman, he proceeded to drive around Lynn looking for defendant's 1971 Ford Maverick.

At New Park Street Swiniarski had learned that defendant's car had been parked in the driveway for some time; that a very strong oder [*sic*] came from the car; that an unsuccessful effort to open the trunk by people there had disclosed what appeared to be suitcases and a large yellow trash bag. Defendant had been requested by residents at 95 New Park Street to move the car. Defendant had driven away in the car on the afternoon of July 19, 1983.

It occurred to Swiniarski that Lisa might be dead and might be in the trunk of the car. He was interested in finding the car. He considered that defendant might be involved in the disappearance of Lisa. He was dealing with possibilities.

Around 10 p.m. that same night, Lynn police headquarters notified Swiniarski to return to the Nadworny home.

Upon arrival Swiniarski was greeted by defendant's parents, grandparents and defendant's sister. He now learned that defendant had telephoned from somewhere and said he was contemplating suicide.

While at the home the telephone rang. Defendant's sister answered. She handed the phone to defendant's mother. After some talk on the phone, defendant's mother told Swiniarski that her son wanted to talk to him.

I find the following conversation now took place between the officer and defendant on the telephone.

After the officer had identified himself, the officer asked the defendant how he was doing. The defendant asked the officer how he was doing. The defendant said he had a lot to think about. The officer asked him, "Do you know where Lisa is?" Then the defendant answered, "She overdosed five months ago, I don't want to talk about it." The officer said, "Where is Lisa or where is the car" Defendant made no answer to this question. The officer then said that the defendant's family was [in] back of him and loved him and asked the defendant if he would come home or meet the officer somewhere. Defendant replied

to this that he did not want to go to jail, that he could not hack it and that he needed time to think and might contact the officer later.

Next, defendant said he wanted to talk to his mother again. The phone was handed back to Mrs. Nadworny.

The next day, a little after noon, Sergeant Jackson of the Lynn police department, received a telephone call from defendant's father. Jackson also knew the Nadworny family well.

The father said defendant was at home and wanted to talk to Jackson. Jackson received permission from the father to bring along Officer Courtney of the Lynn police department.

Jackson knew something of the investigation of Lisa's disappearance. He did not know she was dead. He did not know her body was in the trunk of defendant's car.

The officers went at once to the Nadworny home. There, surrounded by his family, Jackson as a result of defendants request talked to defendant.

The conversation was as follows:

The officer asked defendant what he wanted to talk about. The defendant replied, "She was very sick." The officer said, "Who?" The defendant answered, "Lisa." Officer Courtney then asked when he had last seen her. Defendant replied, "Haven't you heard, she overdosed and is in the turnk of the car."

There is no reason to suppress any of the above statements by defendant.

These statements were not made during any custodial interrogation. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). No right to *Miranda* attached on these facts. *See* discussion *Commonwealth* v. *Bryant,* 390 Mass. 729, 736-743 (1984).

Furthermore, none of these statements in any way contravene due process voluntariness. Officer Swiniarski had a genuine and sincere interest in trying to prevent defendant from committing suicide. Nothing said, including the few comforting re-

marks, in any way had the effect of resulting in the will of defendant being overborne so that what he said could in any way be considered involuntary. The police did not seek out defendant for conversation. The defendant through his family sought the police. What he said was said freely without any coercion. What he said was certainly not the result of any type of trickery on the part of the police.

The Motion to Suppress is Denied in its entirety.

Dated: April 30, 1984 /s/

Andrew R. Linscott
Justice of the Superior Court

[I-35]

TRANSCRIPT OF HEARING ON COMMONWEALTH'S MOTION TO COMPEL HANDWRITING EXEMPLAR BEFORE LINSCOTT, J.
APRIL 20, 1984

. . . . . .

MR. McALARY: There is one motion. There is an order. And there is an affidavit attached to it.

THE COURT: What is your objection?

MR. JENNINGS: May I put my position on the record, your Honor? From the first instance I object to the entire motion because I do not agree with the whole thing of Gilbert against California, upon which the motion is based. And I desire to [I-36] preserve my client's rights to the extent that might be at some later time reversed.

I will, however, recognizing that Gilbert against California for the moment is the law of the land, agreed, while preserving my objection that the Court may order that my client fill in the portions of the exemplar down through line — the line which says 8877 Hough Avenue, South — H-O-U-G-H.

The next sentence requires a testimonial declaration by my client which is protected by the Fifth Amendment.

THE COURT: Wait a minute, you lost me. I got so fascinated by the thought that the Judges of the Supreme Court of the United States are moving along into the late '70's and you think the law might change some day if we live long enough — that I didn't follow your statement. And you're looking at this page, are you?

MR. JENNINGS: Yes, your Honor.

THE COURT: Where are you on it?

MR. JENNINGS: If you read down the page, two-thirds of the way down you will see a notation that says 8877 Hough Avenue, South.

THE COURT: Yes.

[I-37] MR. JENNINGS: It appears to me on a reading of it from there up they are exemplars which in the reading of the Gilbert Case are nothing more than a line-up and therefore, your Honor, on the prepared state of the law would be justified in making an order over my objection that my client fill those out.

THE COURT: Oh, you don't like the above samples?

MR. JENNINGS: Those required testimonial declarations.

THE COURT: What do you say to that?

MR. McALARY: I think it's absurd, your Honor. I think his objection to that, your Honor, is absurd. These are handwriting exemplars. No one is holding them to the truth other than the fact it is his handwriting, that it's an informational type sentence so down the road it can be ascertained whether it was written with his right or left hand.

It just puts that statement in writing. We are not asking for any type of testimonial here. We are asking for an exemplar, that is all that sentence contains.

THE COURT: Tell me again why you want that.

[I-38] MR. McALARY: Your Honor, I am in contact with a handwriting expert by the name of John Swanson out of Weymouth, Massachusetts. He is a well recognized expert in the area. I discussed with him this particular exemplar. He is familiar with this one and it's used by the United States Postal Inspectors as well as himself. It's been used in the past by him. He wants it filled out entirely, basically because down the road he needs to know whether this person is a right or left handed person. And in fact, have that put in the statement.

There is nothing of a testimonial nature of the sentence that is being requested here. It's only informational so the hand-

writing exemplar can take that into consideration while doing his thorough analysis.

MR. JENNINGS: May it please the Court, I have filled out, had my client fill it all out, as I have said, and I am ready to furnish that now.

MR. McALARY: Your Honor, I object.

MR. JENNINGS: According to the order of the Court.

MR. McALARY: I would object to accepting that particular exemplar. I have the State Police [I-39] Officer here. Obviously if we have evidentiary problems at trial, I had a State Police Officer here to witness the taking of the exemplar. Further, in talking to the handwriting analyst, he would like two handwriting exemplars, duplicates taken from the Defendant.

I would ask that format be followed. I appreciate my brother anticipating that this motion would be granted in preparing this in advance. I feel it's totally unacceptable under the circumstances.

THE COURT: You want him to do this twice?

MR. McALARY: That's correct. I would like it observed by my State Police Officer who is here and who will be prepared to testify at trial if that issue arises concerning the authenticity.

THE COURT: When do you want to do it?

MR. McALARY: Right now.

THE COURT: Where?

MR. McALARY: We could do it here in the chambers downstairs, in the library. I think it should be done here or downstairs.

MR. JENNINGS: If your Honor please, my brother made a motion to get something and I just gave it to the Court. Now his problem is he wants [I-40] more than what he asked for. He now tells you he wants a second copy. Because I have given you what he asked for, he now tells you he wants some Officer watch my client do it. He didn't ask for that in his motion. He asked for neither. He got exactly what he asked

for. And I suggest he shouldn't be allowed now to ask for more. He has more than enough to get his opinion now.

THE COURT: The Court will now make the following order. On the motion, the motion is allowed. I appreciate the thought involved in submitting the writing as has been done by Defendant's attorney.

However, I order that the handwriting examplars [*sic*] be done here or downstairs or in one of the offices; that it be done in the presence of the witness that the Government asks to observe it and that they be done in duplicate and in entirety as requested.

MR. JENNINGS: Will your Honor note my objection to the ruling, number one? Number two, mark the document as an Exhibit on the motion so that it will be preserved for the record? And number three, stay the entering of the operation of the order for one week to allow me to determine whether [I-41] I should apply under Rule — Chapter 211 to the Supreme Judicial Court for Relief from the order, since my client complied with the order therein? There will be no effective remedy thereafter.

THE COURT: No. I think a week is too long.

MR. JENNINGS: I have already told your Honor that I am supposed to start a trial next week.

THE COURT: I appreciate that, but time is moving along here and I just can't do that. This can be marked as an Exhibit in this motion. You have no objection to that?

MR. McALARY: I have no objection to that being marked. I do object to anything further that my brother has moved for concerning a stay of execution of this order.

(Exhibit No. 4, Handwriting
exemplar, marked)